

NO. 20770

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SHOPPERS EXCLUSIVE, a)
California corporation;)
MANFREE, INC., a California)
corporation,)
)
Appellants,)
)
vs.)
)
GENERAL ELECTRIC COMPANY, a)
New York corporation, et al.,)
)
Appellees.)
_____)

Appeal from the United States District Court for
the Northern District of California

SPECIFICATION OF ERRORS

APPENDIX A TO OPENING
BRIEF OF APPELLANTS

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BRIEF OF APPELLANTSSubject Index

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APPENDIX A

SPECIFICATION OF ERRORS

I

THE TRIAL COURT ERRED IN DIRECTING A VERDICT FOR EACH DEFENDANT IN A JURY TRIAL, AND IN DISMISSING APPELLANTS' COMPLAINTS AS TO EACH DEFENDANT

II

THE TRIAL COURT ERRED IN ORDERING A SEPARATE VERDICT ON LIABILITY BEFORE ALLOWING THE JURY TO CONSIDER EVIDENCE OF THE DAMAGES SUFFERED BY THE APPELLANTS

In the Further Pre-trial Order filed August 13, 1965,

the Court ruled:

"These issues which relate to liability shall be tried and determined by way of special verdict before the issue of damages is tried before the same jury." (R. 1608-1609).

III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT PERMITTING APPELLANTS TO INTRODUCE EVIDENCE OR OBTAIN JUDGMENT BASED ON DEFENDANTS' ENTRY INTO VERTICAL CONSPIRACIES TO RESTRAIN AND MONOPOLIZE INTERSTATE TRADE AND COMMERCE, AS ALLEGED IN THE COMPLAINTS

The Pre-trial Order of August 13, 1965 defined and limited the issues to be tried as:

"3. The ultimate issues to be tried in these actions on the issue of liability are as follows:

a. Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy prevent plaintiffs from obtaining television sets and major household appliances?

b. Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such a conspiracy

prevent plaintiffs from obtaining television sets and major household appliances?" (R. 1608-1609).

IV

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR IN DISMISSING APPELLEE NORGE
SALES PURSUANT TO MOTION FOR SUMMARY
JUDGMENT, UNDER 15 U.S.C. 15(b)

V

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR IN EXCLUDING EVIDENCE OFFERED BY
APPELLANTS PROVING THAT EACH OF THE
APPELLEES HAD VIOLATED THE SHERMAN ACT
TO THE INJURY OF APPELLANTS

A. Evidence Pertaining To Appellee California
Electric:

1. The Court excluded evidence of admissions by

Mr. Joseph Valenson, appellee's sales manager, showing the existence of a conspiracy between the appellees and co-conspirators with the purpose and effect of depriving appellant Manfree of access to the major lines of the subject products. Appellants offered to prove the following admissions made to Mr. Bernard Freeman, an officer of appellants, in the factual context noted:

a. In October, 1962, Mr. Valenson telephoned Mr. Freeman, and stated that appellants had a "million dollar conspiracy case", that "lawyers were putting words in his mouth", and that "he couldn't take it any more" and was "willing to help" appellants. (Tr. 3565-3569, 3574-3579).

b. Mr. Valenson also told Mr. Freeman that members of his company had requested him to give false testimony in his deposition, and that they were afraid to have him testify for fear of what his testimony would show. (Tr. 3757-3762).

c. Mr. Valenson further admitted to Mr. Freeman that Mr. Muntain, appellee's salesman (Tr. 3933) calling on

Manfree (Tr. 3967-3971), had not told the truth about appellee's refusals to deal in his deposition (Tr. 5859-5863).

Appellants also offered these admissions in rebuttal to California Electric's defense that Manfree did not want to buy the Norge line (see Tr. 3967-3971). (Tr. 5859-5863).

Appellees' repeated objections to the introduction of this evidence, in substance, were that it was hearsay to all parties, Valenson's authority to speak for his company was not established, and that the admissions were not statements in furtherance of a conspiracy. (See Tr. 3574-3579, the transcript references above, and Defendants' Memorandum of the Inadmissibility of the Hearsay Declaration Attributed to Joseph Valenson (R. 1706-1723).) See, also, appellants' Memorandum in Support of the Admissibility of the Declarations of Joseph Valenson (R. 1742).

The Court ruled the admissions were inadmissible:

"THE COURT: . . . (B)ut it's also prejudicial, and because it is prejudicial and because it is not a statement in furtherance of conspiracy, I am not admitting it." (Tr. 5863).

2. The Court excluded the testimony of Mr. Rising, an officer of appellee (Tr. 3664), concerning the general practice of manufacturers in the major appliance industry to establish retail prices that must be shown in dealer advertising, in order for the dealer to obtain co-operative advertising credits from the manufacturer or its distributor. That testimony was:

"Q. (MR. KEITH): Now, Mr. Rising, are you familiar with an advertising - - with the co-operative advertising policy of California Electric Supply during this period '57 to '62?

A. In general.

Q. Didn't you have a policy which you would not give advertising credits unless the dealer advertised at the suggested list price of California Electric Supply or at no price at all?

A. General industry practice that the factory establishes a price that they will allow the cooperative advertising to be . . .

MR. LITTMAN: Your Honor, I will move to strike the witness's testimony.

MR. KEITH: Will you let the witness answer, please.

MR. LITTMAN: I will move to strike the witness's testimony because it is founded . . .

THE COURT: The motion is granted."
(Tr. 3813-3814).

3. The Court excluded evidence that appellee granted direct preferential and discriminatory arrangements to co-conspirator Hale, in excluding Pl. Ex. for Id. Nos. 68, 69, 85, 1789 and 5021. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
68, 69, and 85	no foundation (Tr. 3837-3841)	Tr. 3841 ("cumulative")
1789	irrelevant (Tr. 3570)	Tr. 3570
	Court's own motion (Tr. 3616)	Tr. 3616
	hearsay, irrelevant, no foundation (Tr. 3713-3718)	Tr. 3718
5021	irrelevant (Tr. 3750)	Tr. 3750
	hearsay and irrelevant (Tr. 3616-3617)	Tr. 3617

Appellants made offers of proof concerning Ex. Nos. 1789 and 5021; objections to 1789 as lacking foundation (Tr. 3727-3733A) and to 5021 as being hearsay and without foundation (Tr. 3737-3739) were sustained.

a. Ex. Nos. 68, 69, and 85 (A-0) are documents relating to Hale's "associate distributor" advertising funds for Philco products in 1962, showing a substantial over-expenditure of advertising funds in relation to credits earned.

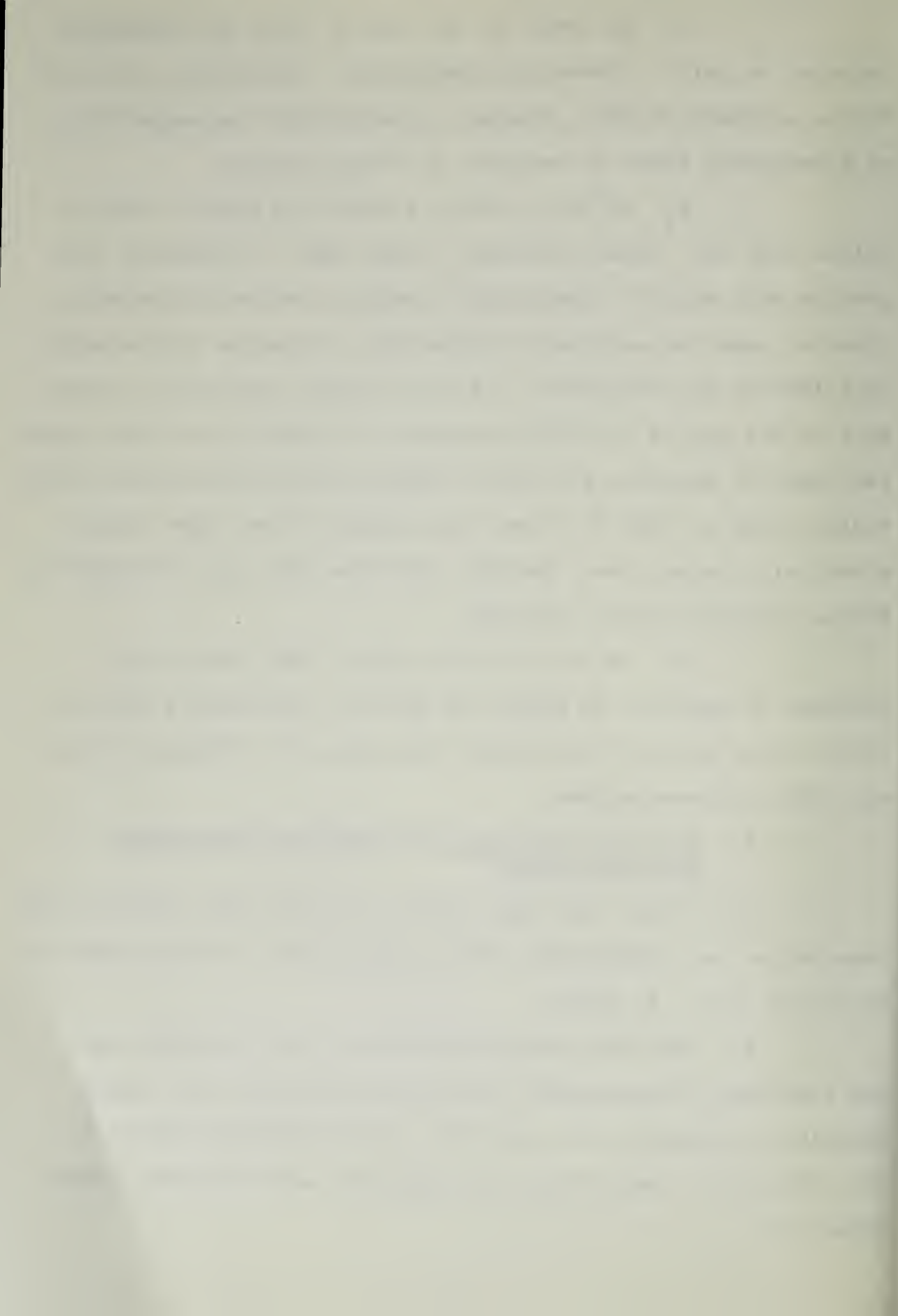
b. Ex. No. 1789 is a letter of March, 1960 to Philco from its "sales assistant - area west", concerning "our problem with Hale's", describing a meeting between representatives of appellee and Philco where Hale's sizeable over-expenditure (above) was discussed, and Philco asked appellee to assume part of the sum of \$6,512.92 overpaid. It also notes that appellee reported spending \$25,000 to \$30,000 from co-operative advertising funds in 1959 to "keep this account alive" when Philco advertising support was "pulled", and that Hale was "sitting" on Philco inventory worth \$100,000.

c. Ex. No. 5021 is a May, 1960 letter from Valenson of appellee to Newman of Philco, forwarding a debit of \$97.83 to be paid by the factory for costs of a "dinner meeting" with Hale representatives.

B. Evidence Pertaining To Appellees Borg-Warner
And Norge Sales:

(The Court held that there was sufficient evidence that Borg-Warner was responsible for the activities of Norge Sales to go to the jury. R. 1962.)

1. The Court struck Borg-Warner Ex. No. 9024, and the testimony of appellants' advertising manager, Mr. Joseph Mittelman, concerning Ex. No. 9024. The testimony appears at Tr. 2105-2123. The grounds for objection and transcript references are:



<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
9024	Offered by appellee (Tr. 2164) Motion to strike: hearsay, no authority for declarant shown (Tr. 6624, 6622-6630)	Admitted (Tr. 2164) Tr. 6630
	Motion to strike testimony on grounds above (Tr. 6855-6865)	Tr. 6865

Appellants moved for reconsideration of the order striking Ex. No. 9024, which was denied (Tr. 6845-6846).

a. Mittelman testified that he had a conversation on or about December 8, 1960, with Mr. Aro, classified advertising salesman for co-conspirator San Francisco Examiner, where Aro solicited appellants' advertising for the classified section (appellants were unable to get the Examiner to accept ads for customary placement). Although Aro took copy, he called Mittelman back to say that even those ads would not be acceptable; because the Examiner felt appellant U.S.E. was a "discount house"; its policy was not to accept discount store advertising; that ads from such stores would directly compete with advertising of regular downtown retail stores in San Francisco such as Hale, Macy's, The Emporium, and Roos/Atkins who did not want U.S.E.'s advertising in the newspaper. Aro told Mittelman he had checked all this out with people senior to him in the newspaper organization.

b. Ex. No. 9024 is a memorandum containing the substance of the Aro-Mittelman conversation, prepared at the latter's direction immediately after the conversation.

2. The Court excluded documentary evidence from the files of Borg-Warner, showing that it and appellees Hotpoint, Frigidaire, and other major electrical appliance manufacturers consciously planned to and did establish uniform retail pricing



for their products, and jointly established a fixed distribution system. This evidence is contained in Pl. Ex. for Id. Nos. 431, 3006, and 3007. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
431	irrelevancy and no foundation (Tr. 6461-6469)	Tr. 6469
3006	no foundation (Tr. 6469-6477)	Tr. 6477
3007	irrelevancy and no foundation (Tr. 6496)	Tr. 6496

Appellee stipulated that Ex. No. 431 came from the files of appellee Norge Sales (a wholly-owned subsidiary of Borg-Warner.) Tr. 6473.

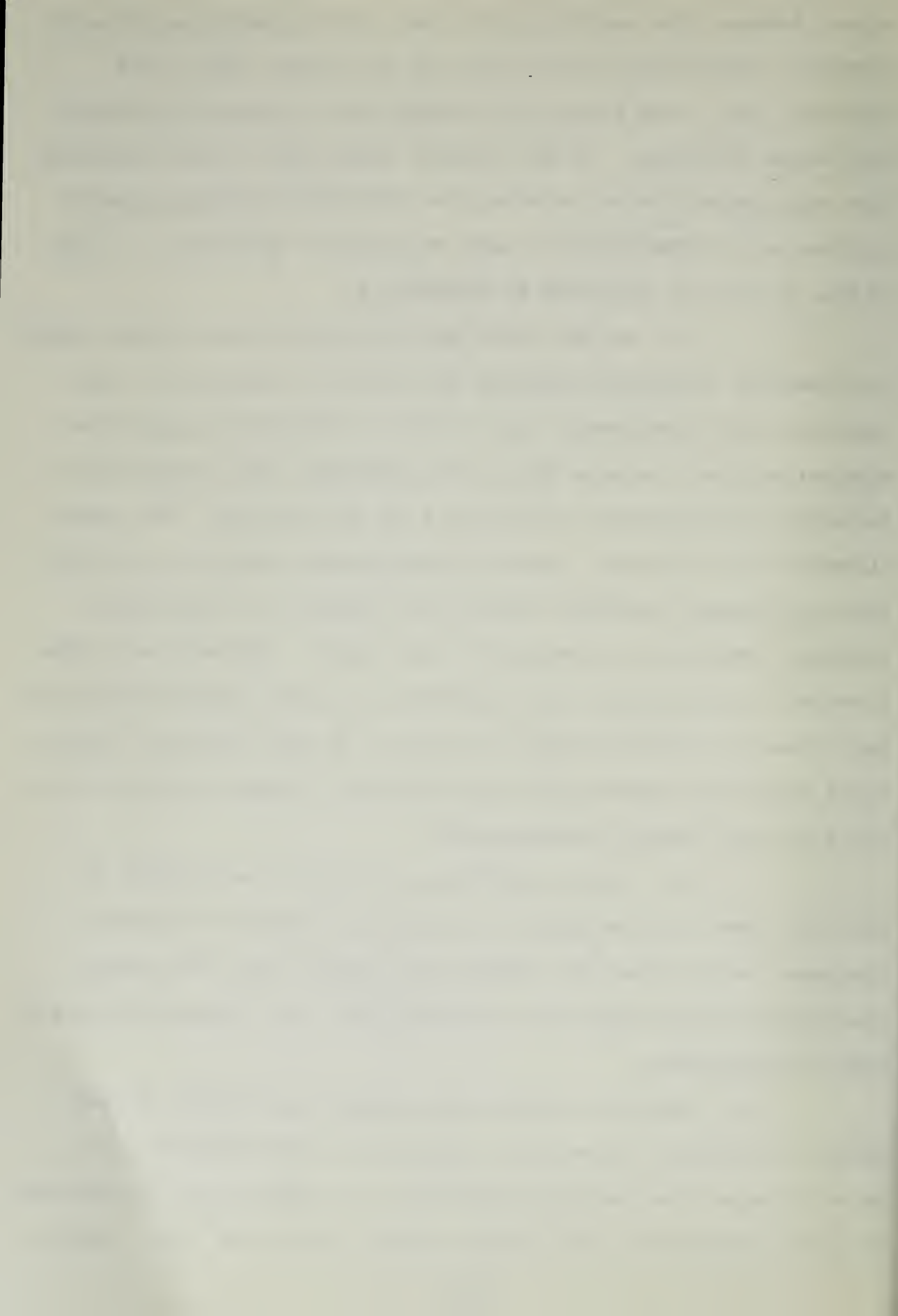
a. Ex. No. 431 is a memorandum from Mr. Sayre (officer of Norge Sales) to Messrs. Bull, Quale, and Fisher of Borg-Warner (Norge Division) dated July 15, 1960, reporting on a recently held meeting of the National Electrical Manufacturers' Association (N.E.M.A.) attended by Sayre, where factory representatives discussed "executive management responsibility in marketing practices". It reports that the leading electrical appliance manufacturers were concerned about trying to "out-bid" each other for business, and listed other causes for the then-depressed state of the electrical appliance market. Mentioned as a primary cause was the manufacturers' approach to "large volume retailers"; the correction was noted to be the establishment and maintenance of distributor prices and dealer prices to be used with all retailers, regardless of type and sales volume, with each manufacturer agreeing not to permit variances from such established retail and distributor prices. It was to be

agreed between the manufacturers that all co-operative and supplemental advertising funds were not to exceed "50% of the national rate", and promotional funds not to exceed 1% of maximum dealer billings. It was further noted that it was incumbent upon each manufacturer to bring its individual pricing program in line with competition to make the program effective. A copy of Ex. No. 431 is attached as Appendix B.

b. Ex. No. 3006 are minutes of the N.E.M.A. Board of Directors (Consumer Products Division) for January 6, 1960, reporting the development of a "code of advertising practices" adopted earlier the same day by the American Home Laundry Manufacturers' Association (A.H.L.M.A.) at its meeting. The Board planned to co-ordinate, between manufacturer members, publicity for all consumer products sold by all members in regulating retailer advertising pursuant to the "code". Members were also directed to accelerate their reporting of full sales statistical data from all trading areas to N.E.M.A. so that N.E.M.A. statistical summaries showing each manufacturer's share of each market could be more rapidly disseminated.

c. Ex. No. 3007 is an N.E.M.A. memorandum of July 18, 1960, to the Board of Directors, Consumer Products Division, noting that the members had agreed that they would standardize their capacity classifications for refrigerators and similar appliances.

3. Evidence showing the purpose and intent of Borg-Warner to restrain interstate commerce in the manufacture and sale of major home laundry appliances, in agreeing to an exchange of price information with, among others, appellees G.E., Maytag,



and Frigidaire, and the establishment of a fixed distribution system, was excluded. This evidence is contained in Pl. Ex. for Id. Nos. 3022, 3024, 3026, 3029, 3030, 3032, 3036, and 3037. Objections that such evidence was hearsay, irrelevant, and without foundation were sustained (Tr. 6477; see objections at 6471, 6475; generally, at 6471-6477).

a. Ex. No. 3022 shows that A.H.L.M.A. members (including the appellees named above) discussed the desirability of jointly controlling production in order to control market conditions; that Borg-Warner wished to establish good and close relations with fellow members like G.E., Maytag, Frigidaire, and Westinghouse; that all members wanted to facilitate the exchange of their "published prices" and appliance specifications, to keep the status of such information available to all members "up to date".

b. Ex. No. 3024 is an A.H.L.M.A. report of factory sales of certain major appliances during 1959, showing average prices and number of units sold.

c. Ex. No. 3026 is a letter of October, 1959 from A.H.L.M.A. to Mr. Bull of Norge Sales, commenting on the Association's "voluntary code covering advertising prices", and its decision not to seek Federal Trade Commission review or approval of the program.

d. Ex. Nos. 3028 and 3029 are A.H.L.M.A. documents showing the exchange of individual marketing information, data about relative shares of markets, and prices and specifications of laundry appliances, between members (including certain of the appellees).

e. Ex. No. 3032 is an A.H.L.M.A. directive that all manufacturer members provide each other with their individual product "specification sheets" (as Whirlpool had done).

4. The Court excluded Pl. Ex. for Id. Nos. 1922, 1923, and 3095, distributor price lists of co-conspirator Lancaster (Norge distributor for Northern California), found in the files of Borg-Warner, and of retailer Hale. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
1922	no foundation (Tr. 3019-3030 no foundation (Tr. 6540-6547)	Tr. 3030 Tr. 6547
1923	no foundation (Court's own motion) no foundation (Tr. 2865-2866; • see 2829-2833 for similar lists)	Tr. 887-890 Tr. 2866
3095	no foundation (Tr. 3019-3020)	Tr. 3020

See, also, appellants' offer of proof concerning Ex. Nos. 1922 and 1923 (Tr. 6540-6547).

a. Ex. Nos. 1922 (A-CY) and 3095 are Lancaster's distributor price sheets (for the periods (1957-1962, and 1959, respectively), in the possession of appellee. Ex. No. 3095 includes prices specified as "promotional list prices". Ex. No. 1923 consists of similar price sheets found in the possession of co-conspirator Hale, containing "suggested list prices".

5. The Court excluded Pl. Ex. for Id. No. 4028, showing the purpose of senior representatives of Borg-Warner and Norge Sales in meeting with representatives of co-conspirators Lancaster and Graybar (Norge distributors in California) to discuss certain shipments of Norge appliances to Manfree, during the period when the boycott was otherwise in effect. An objection of

lack of foundation for this Exhibit was sustained (Tr. 2973-2976).

a. Ex. No. 4028 is a handwritten memorandum from the files of Borg-Warner. It states that it is "very important" to get an opinion from appellee's attorneys concerning the situation where Mr. Bert Green, of Green's Department Store, Los Angeles (acting as appellants' agent - see Tr. 5500-5504), had been able to transship Norge appliances to Manfree, through co-conspirator Graybar's office in Los Angeles. It also notes that telegrams were to be sent to Mr. Freeman (Lancaster) and Mr. Bonnet (Graybar, Los Angeles), telling them it was very important that they discuss the transshipments with Mr. Bull, at the prospective meeting at the Villa Hotel, San Mateo, California.

6. The Court granted a motion to strike the testimony of Mr. Bert Green (identified above), concerning statements made to him by a representative of co-conspirator Graybar, on the ground that there was no showing of authority on the part of the declarant to bind his company, nor a prima facie showing of conspiracy so as to apply the evidence against the appellees, and that such evidence was irrelevant and hearsay (Tr. 5515-5519).

a. Green testified that after the transshipment incident previously referred to, he saw Mr. Bonnet of Graybar at a "new line" showing at Graybar, Los Angeles, in 1960. He offered Bonnet another order for Norge appliances to be shipped to Manfree. Bonnet rejected the order, saying to Green "if you give me trouble I'll take you off the list too" (Tr. 5517). See Tr. 5515-5519.

7. The Court failed to apply Mr. Green's testimony

concerning the reasons given him by managing agents of co-conspirator Graybar why they would not sell Norge appliances to Manfree, against Borg-Warner and Norge Sales.

Objections to the testimony were that it was hearsay and irrelevant (Tr. 5469-5479); during appellants' offer of proof upon the testimony, an additional objection was made that there was no showing of authority on the part of the declarant to bind his principal (Tr. 5480-5493). At the close of the testimony, when it was offered against Borg-Warner, the Court ruled as follows:

"THE COURT: . . . There's some serious doubt as to the admissibility of the - - and I'm not going to make a ruling now, as to this conversation which presumably came from somebody from Lancaster, because its hearsay upon hearsay.

Now, I have liberalized the hearsay rules here in these proceedings.

What I did admit is clearly hearsay, and the question that then arises in my mind is whether the hearsay upon hearsay is also admissible, and I'm going to reserve ruling on this. I'm not making a ruling at this time." (Tr. 5515).

In its Memorandum Opinion, the Court would not apply this testimony against Borg-Warner or Norge Sales (R. 1912, 1963-1964). See, also, appellants' offer of proof at Tr. 5479-5488.

a. Mr. Green testified that at a meeting with Messrs. Bonnet and Ash of Graybar, Los Angeles, at the latter's office, he asked Bonnet to order a carload of Norge appliances for shipment to Manfree. Bonnet replied that he could not do it because "Lancaster wouldn't allow me" (Tr. 5508). At Green's request, Bonnet telephoned Lancaster in San Francisco to ask why Graybar couldn't transship to Manfree; Bonnet told Green that he

was told during this call that it didn't matter if Graybar sold to Manfree, but that Lancaster would not because". . . I don't want to jeopardize a million dollar business with Broadway-Hale" (Tr. 5509).

8. The Court excluded evidence that these appellees granted direct preferential and discriminatory arrangements to co-conspirator Hale, in excluding Pl. Ex. for Id. Nos. 643, 645, 3085, 3086, 4092, and 4098. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
643, 645	no foundation (Court's own motion)	Tr. 2869
3085	irrelevant (Tr. 529-530)	Tr. 530
3086	irrelevant, no foundation (Tr. 527-529)	Tr. 529
4092	irrelevant (Tr. 2698-2700)	Tr. 2700
4098	irrelevant (Tr. 2737-2738)	Tr. 2738

It was stipulated that Ex. Nos. 643 and 645 were authentic (Tr. 2869).

a. Ex. No. 643 (A-B) shows recognition by Norge Sales that "key accounts" (like Macy's and Hale) required special "advertising support" from the factory; and shows that co-conspirator Macy's was receiving such support.

b. Ex. No. 645 shows that Hale and Macy's were two of the three San Francisco Norge dealers getting special "key account" advertising funds; \$22,323.04 had been provided by the factory for a 6-month period in 1957.

c. Ex. No. 3085 is the calling card of Mr. Sanford, then Hale's appliance sales manager, obtained from Borg-Warner's files.

d. Ex. No. 3086 is an invitation to Sanford of Hale from Sayre of Borg-Warner, inviting Sanford to meet with Borg-Warner's senior management personnel.

e. Ex. Nos. 4092 and 4098 (X,Y) show that Borg-Warner maintained a program of special cocktail parties at its national "trade shows", to be attended only by representatives of selected "key account" retailers and senior Borg-Warner management personnel, recognizing the need to cultivate these dealers; and the selection of representatives of Hale and Macy's by co-conspirator Lancaster (the local Norge distributor) to attend such parties to be held in January, 1958.

C. Evidence Pertaining To Appellee G.E.:

• 1. The Court excluded the admissions of representatives of G.E. that its dealers did not engage in retail price competition in San Francisco; that it investigated to find out which brands of appliances and television sets were being sold by discount stores in San Francisco, San Jose, and Oakland; and that it agreed to sell its products to a large discount store chain ("White Front") in Oakland only after co-conspirator Hale ceased selling appliances and television sets in San Francisco. This evidence is contained in Pl. Ex. for Id. Nos. 5032, 5033, 5034, 5044, 5045, 5046 and 5047. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
5032, 5033, 5034, 5044	irrelevant (Tr. 5258)	Tr. 5258
5045, 5046 5047	irrelevant, no foundation (Tr. 5264-5266)	Tr. 5266

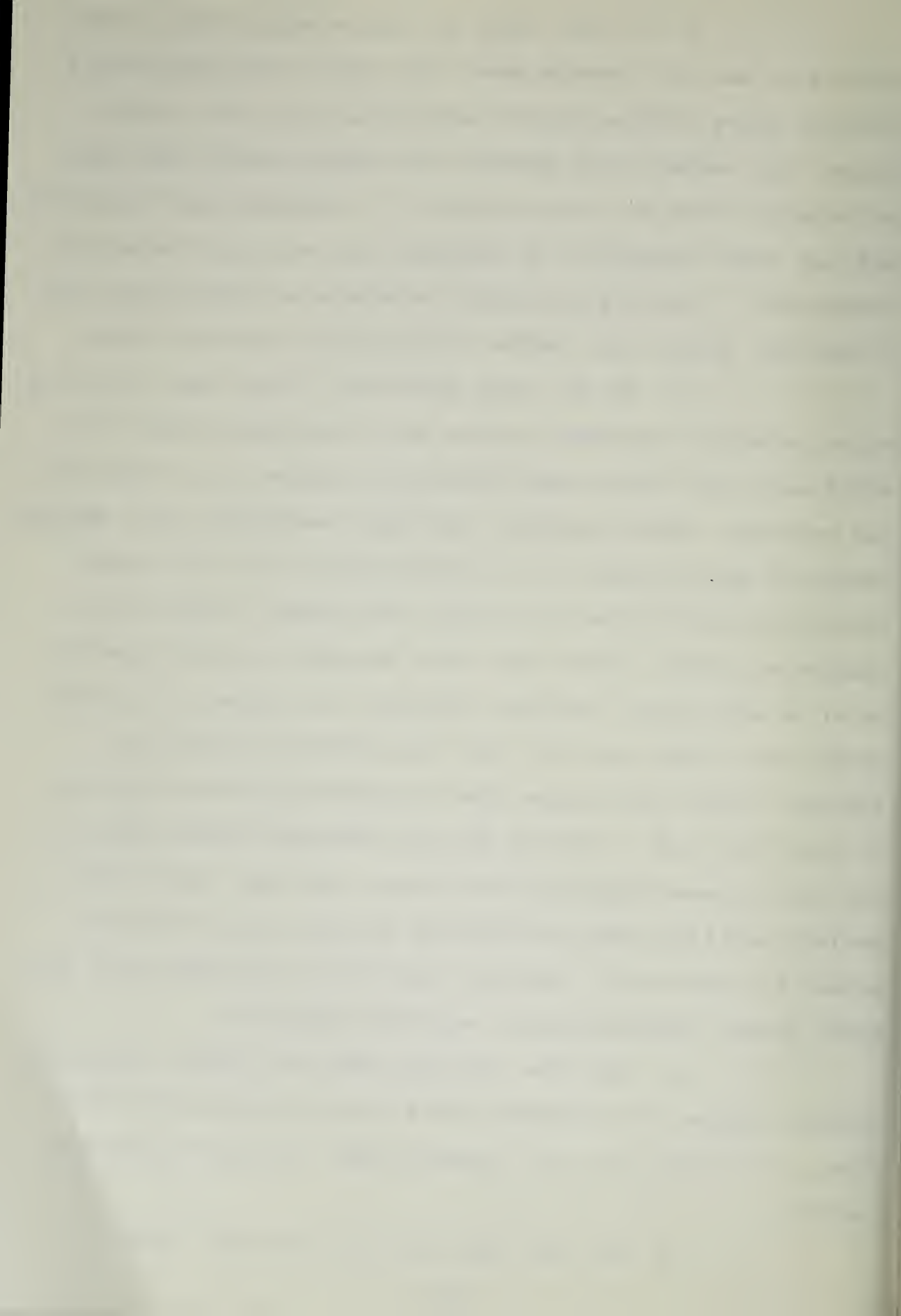
See appellants' offer of proof at Tr. 5251-5258.

a. Ex. No. 5032, an intra-company study, indicates G.E. was very worried about the effect its franchising a discount store ("White Front") would have upon other, established G.E. dealers, and whether such actions would cause loss of "support" from the other dealers. It observes that Frigidaire and G.E. were refusing to do business with so-called "mass merchandisers". There is a specific reference to losing Macy's as a retailer, should G.E. decide to franchise a discount house.

b. Ex. No. 5033 indicates, on its face, that G.E. sales personnel expressed concern that franchising White Front could well cause their other dealers to abandon price stability, and encourage "price warfare"; and their recognition that dealers would not calmly accept G.E.'s franchising a discount store. Concern was also stated that such a move would disrupt G.E.'s dealers structure, would hurt sales (because of dealer resistance) as well as its "N.E.M.A. position" (of sales.) It recognizes that in the past G.E. had intentionally excluded the discount stores, and states that Frigidaire had done likewise. It notes that G.E.'s dealers did not advertise retail prices, and had followed suggested list prices, and that their large dealers would cut back on purchases of G.E. should discount stores be franchised. Finally, there is an evaluation that discount stores "unquestionably" would be successful.

c. Ex. Nos. 5034 and 5044 are similar documents, showing further intra-company fears that by franchising White Front, G.E. would lose its "present team" of retail dealers in reaction.

d. Ex. No. 5044 is a G.E. business record



indicating that White Front was opening a store in South San Francisco, and that appellee was ready to franchise it.

e. Ex. Nos. 5045-5047 show that G.E. was concerned about the various brands of television and major appliances being carried by the discount stores in the Bay Area, (including appellants) and contain the listing of the various brands found at these stores.

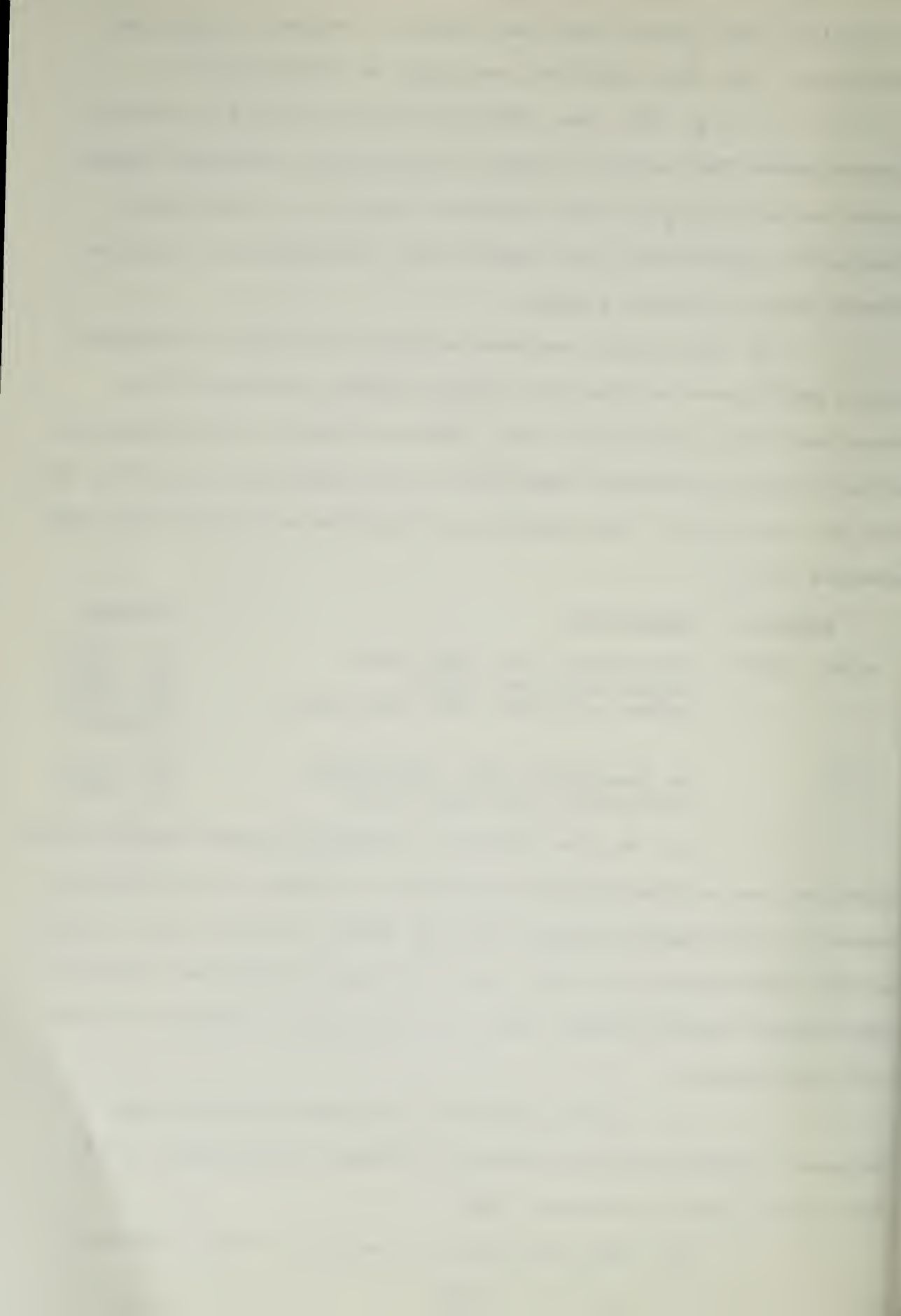
2. The Court excluded evidence of sales of Hotpoint brand appliances to discount stores located outside of San Francisco (Pl. Ex. for Id. Nos. 4196 and 5052); and evidence of direct dealings between Hotpoint and co-conspirator Hale (Pl. Ex. for Id. No. 4391). The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4196, 5052	irrelevant (Tr. 5456-5457)	Tr. 5457
	irrelevant (Tr. 6513)	Tr. 6513
	(offer of proof, Tr. 5456-5457)	Tr. 5457 (denied)
4391	no foundation (Tr. 3238-3246)	Tr. 3246
	irrelevant (Tr. 6509-6513)	Tr. 6513

a. Ex. No. 4196 is a Hotpoint record showing that appellee was selling Hotpoint products to White Front discount store in Los Angeles during 1957 and 1958, to White Front stores in the Oakland area in 1963, and to "G.E.M." discount stores in San Leandro and San Jose, while it continued to refuse to deal with appellants.

b. Ex. No. 5052 is a document showing that Hotpoint franchised White Front in Oakland in November, 1963, and in San Jose in January, 1964.

c. Ex. No. 4391 is a Hotpoint "dealer contact



report", stating that a Hotpoint representative had inspected Hale's store and reported that its business was "going great"; expressing a hope that Hale could soon be franchised as a Hotpoint dealer in San Francisco; and noting the desirability of getting the Hale account.

3. The Court excluded evidence that the consent of Hotpoint was considered necessary by Mr. Vern Brown, district appliance manager for co-conspirator Graybar (local Hotpoint distributor) before Graybar ceased selling Hotpoint appliances to discount stores in San Francisco, by excluding Pl. Ex. for Id. Nos. 5112 and 5113.

These exhibits were offered in connection with the testimony of Mr. Brown, at Tr. 6084-6086. The offer was rejected by the Court, based on its rulings that the exhibits, and the witness, had not been listed by appellants in their pre-trial pleadings. (See Court's ruling and argument thereon, at Tr. 6065-6070).

a. Pl. Ex. for Id. Nos. 5112 and 5113 consist of 1958 correspondence between Mr. Brown and an officer of Graybar, and which the latter states to Brown that the new sales policy of Graybar is not to renew the franchises of "those White Front" discount stores, because Graybar wanted other, more established dealers to "listen to our story". It also directed the cancellation of franchises of any dealers who transshipped goods. In his reply, Mr. Brown indicated that it would not be appropriate to cancel franchises at the moment, but such should be done over a gradual period of time. He noted that cancelling a discount house (in Oakland) would mean a loss of substantial

income to Graybar, as well as a loss of position in the trading area by Hotpoint. He clearly stated that to cancel such franchises in San Francisco, Graybar would have to get Hotpoint's permission and would thereafter require much in the way of "money support".

4. The Court excluded appellants' offer of the testimony of Mr. Brown that Graybar was required to cease selling Hotpoint appliances to discount stores in San Francisco, in order to be able to sell to the large department and appliance stores.

The Court's ruling upon the permissible scope of Mr. Brown's testimony appears at Tr. 6065-6070. Appellants offer of proof appears at Tr. 6099-6106. The Court excluded this evidence on the grounds that Mr. Brown had not been properly listed as a prospective witness in appellants' pre-trial pleadings. (See Tr. 6103-6106).

a. Appellants offered to prove, through the testimony of Mr. Brown, that he was demoted and replaced by Mr. Mayben, who then changed Mr. Brown's policy of selling Hotpoint appliances to discount stores. Mr. Brown's testimony would also be that when Hotpoint was sold to discount stores, Hotpoint would not provide such dealers with follow-up services and assistance (contrasted to other dealers); that Hale representatives would not discuss buying Hotpoint while Graybar was selling to the "G.E.T." discount store in San Francisco, and that after the discount stores were cancelled as Hotpoint dealers, Graybar's annual sales volume dropped from \$12 million to \$8 million. (See Tr. 6103-6108).

5. The Court excluded appellants' offer of the testimony of Mr. Bernard Freeman about the statements of a G.E. salesman to him when he requested the G.E. major product lines.

The offered testimony was objected to on the grounds that there was no showing of salesman's authority to bind his company (Tr. 5867-5868), which was sustained. (Tr. 5869).

a. The testimony of Mr. Freeman concerning his conversation with Mr. White of G.E. was that when the latter called at U.S.E., he told Mr. Freeman that Manfree was not going to be able to obtain the G.E. appliance line in 1957, because the San Francisco "dealer structure" prevented such sales being made. (Tr. 5868-5869).

6. The Court excluded evidence that G.E. had direct preferential and discriminatory arrangements with co-conspirator Hale, in excluding Pl. Ex. for Id. Nos. 1184, and 5090-5100. Counsel for G.E. stipulated that Ex. Nos. 5090-5100 were authentic (Tr. 5362). The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
1184	no foundation (Tr. 6520)	Tr. 6520
5090-5100	irrelevant (Tr. 5357-5361, 5363).	Tr. 5363

See, also, appellants' offer of proof as to Ex. Nos. 5090-5100 at Tr. 5360-5362.

a. Ex. No. 1184 shows that G.E. allowed Hale 100% paid advertising credit for newspaper ads in San Francisco in June, 1959, under a "special advertising fund".

b. Ex. Nos. 5090-5100 are G.E. co-operative

advertising authorizations (dated 1959) giving that retailer 100% compensation for its newspaper advertising during this period. Ex. No. 5090 indicates that a "special flat rate" was provided for the month of February, 1959.

7. Evidence that Hotpoint maintained suggested prices for Hotpoint products after 1958 (Pl. Ex. for Id. No. 5050) was excluded. This evidence was offered in connection with the reading of the deposition of Mr. Wichman, a senior officer of appellee Hotpoint. Admissibility of the evidence was objected to on the grounds of lack of foundation, which was sustained. (Tr. 5453-5454).

a. Ex. No. 5050 is a schedule, prepared by Hotpoint applicable to Northern California, Salt Lake, and Boise, tabulating as to certain models the suggested retail prices (for the San Francisco area) and dealer prices actually charged, which are identical.

D. Evidence Pertaining To Appellee R.C.A.:

1. In rejecting Pl. Ex. for Id. Nos. 343 and 344, the Court excluded clear evidence that R.C.A. established and maintained a retail price program by which retailers selling its products were required to maintain price uniformity in San Francisco County; and that the distributor of R.C.A. products, in fact, followed retail price statements promulgated by appellee. The grounds of objection and transcript references are:

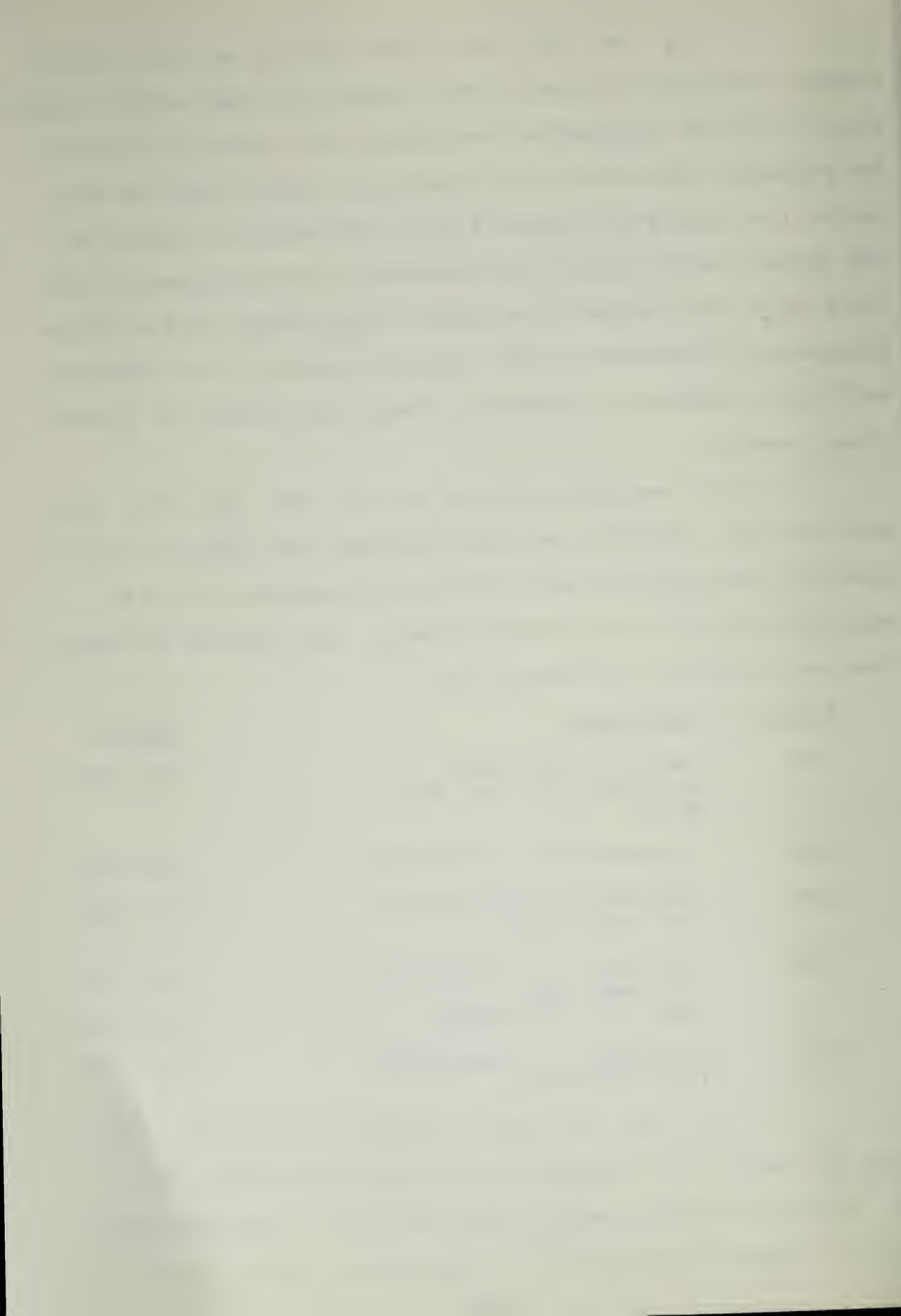
<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
343, 344	irrelevant, no foundation (Tr. 4549-4552)	Tr. 4552
	same (Tr. 4717-4719)	Tr. 4719
	appellants' offer of proof; same objections (Tr. 6497-6508).	Tr. 6839 (offer denied)

a. Ex. Nos. 343 and 344 consist of R.C.A. intra-company memoranda in August, 1957, between Mr. Maag and Mr. Saxon, senior officers of appellee, concerning the request of R.C.A.'s San Francisco distributor, co-conspirator Meyer, that the suggested list prices on certain R.C.A. merchandise be raised by the factory (with a price list attached, containing pencil notations as to the changes in suggested list prices); and a similar memorandum in September, 1958, from Mr. Wallace to Mr. Peterson, both R.C.A. officials, attaching a Meyer price sheet on "promotional models".

2. In excluding Pl. Ex. for Id. Nos. 348, 5060, 5061, 5068 and 5070, the Court excluded evidence that appellee R.C.A. directly controlled the advertising and promotion of R.C.A. television sets in San Francisco County. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
348	hearsay, irrelevant, no foundation (Tr. 4603-4604)	Tr. 4604
5060	irrelevant (Tr. 4553-4554)	Tr. 4554
5061	irrelevant, no foundation (Tr. 4783-4785)	Tr. 4785
5068	irrelevant, no foundation (Tr. 4809-4810 same (Tr. 6495-6496)	Tr. 4810 Tr. 6496
5070	irrelevant, no foundation (Tr. 4812-4813)	Tr. 4813

a. Ex. No. 348 is a letter of September, 1958, from Mr. Henry, Vice-President of co-conspirator Meyer, to Mr. Wallace of R.C.A., making objections to the factory about R.C.A.'s national advertising of televisions, seen in the



San Francisco area, at lower prices than the R.C.A.'s suggested retail price for San Francisco.

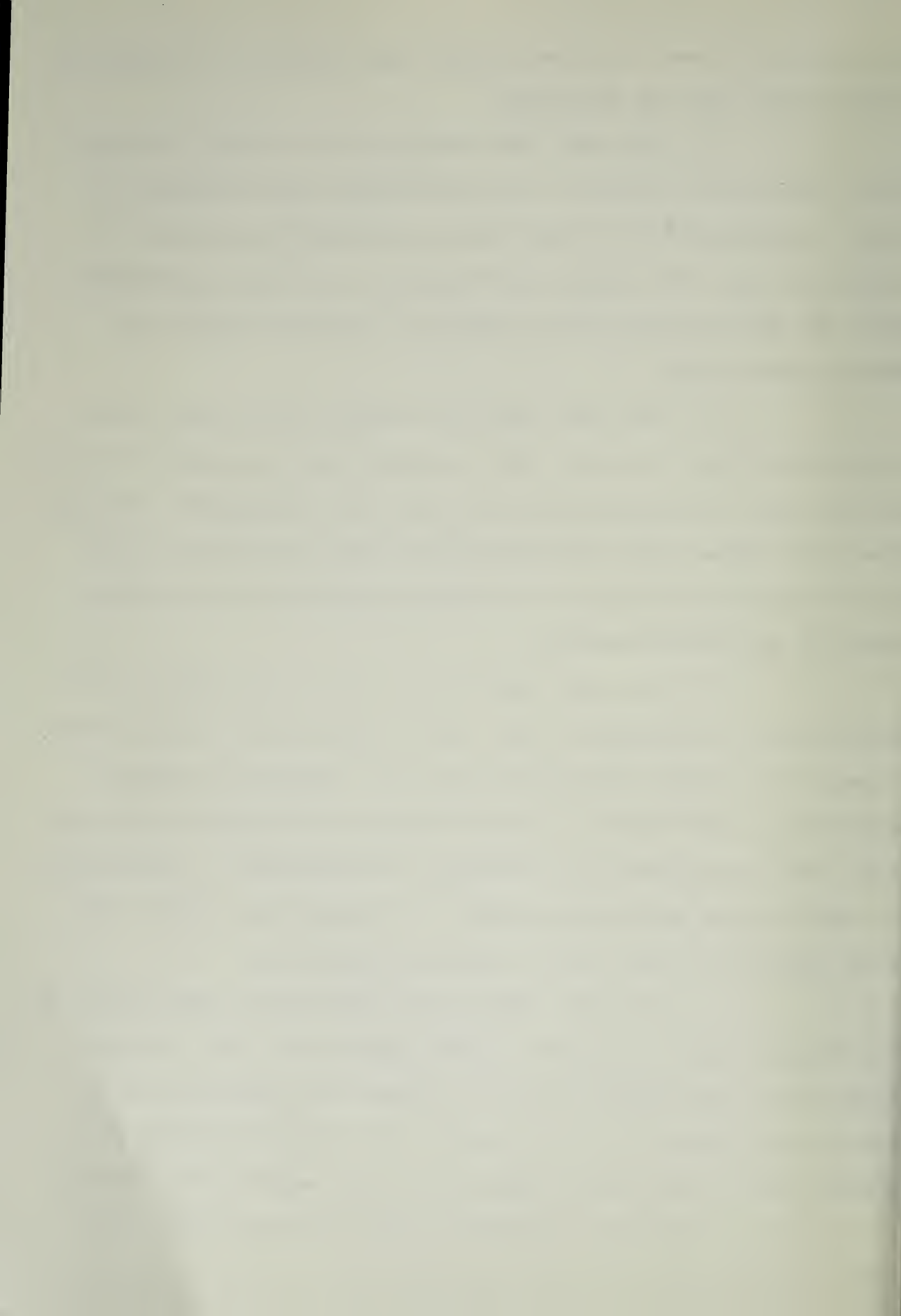
b. Ex. No. 5060 consists of a written instruction from R.C.A. to all of its distributors dated February 2, 1959, requiring them to base their advertising allowances to retailers upon list prices; and discontinuing the requirement that the distributors had to match the factory's funds for dealer advertising.

c. Ex. No. 5061 is a letter from R.C.A. to co-conspirator Meyer in June, 1963, setting out a program for R.C.A. factory-paid advertising for all local area newspapers, listing the local dealers who would benefit by such advertising; and instructing the distributor to set the pricing that would be shown on the advertisements.

d. Ex. No. 5068 is an R.C.A. memorandum to its distributors of December, 1962, with instructions how to control "comparative price advertising" by R.C.A. dealers by denying advertising fund credits to such dealers; and requiring affidavits under oath from R.C.A. dealers participating in distributor or manufacturer advertising funds, verifying what prices they were showing on their R.C.A. product advertising.

e. Ex. No. 5070 is an instruction from R.C.A. to its distributors of December, 1962, showing the full control exercised by the factory over the payment by distributors of advertising money to R.C.A. dealers, in that the factory required that it give prior approval of such payments to dealers.

3. The Court refused to admit evidence that R.C.A. had directly refused to sell its television sets to appellant



Manfree, in excluding Pl. Ex. for Id. Nos. 1691 and 1702. The grounds of objection and the transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
1691	no foundation (Tr. 6114-6117)	Tr. 6117
1702	irrelevant (Tr. 5969-5970)	Tr. 5970

a. Ex. No. 1691 is a letter dated July 13, 1960, from Mr. Alpine, President of appellants, to the National Sales Manager of R.C.A., requesting the right to buy R.C.A. products.

b. Ex. No. 1702 is a letter dated December 16, 1963, from R.C.A.-Victor Distributing Corporation, of Los Angeles to Manfree, stating that the former would not sell R.C.A. appliances to appellant.

4. The Court excluded the deposition testimony of Mr. A. H. Meyer, former officer of co-conspirator Meyer, showing that R.C.A. distributed television sets directly to retailers in Southern California; that Meyer and R.C.A.-Victor Distributing Corporation of Los Angeles agreed to a territorial division for R.C.A. product distribution in California; and that the latter refused to sell television sets to Manfree in respecting this exclusive territorial arrangement.

The testimony of Mr. Meyer set out in his deposition appears at deposition Tr. 10:15-22 and 15-17. The Court refused to permit the deposition testimony to be read into evidence. (Tr. 4415; 4489-4490).

a. In his deposition testimony, Mr. Meyer said that R.C.A. products were distributed in the Los Angeles area by "R.C.A.-Victor Distributing Company which is a wholly owned

subsidiary of the Radio Corporation." This subsidiary had the exclusive distribution rights in the counties south of the Tehachapis; or, Southern California (Deposition, Tr. 10). Mr. Meyer also admitted that R.C.A.-Victor Distributing Corporation sells R.C.A. products directly to dealers in the Southern California area; and that when they attempted to sell their products in Northern California, his company had made objections. He admitted that he had had discussions with R.C.A. officials concerning this problem of "transshipments" (Deposition, Tr. 15-17).

5. In excluding Pl. Ex. for Id. Nos. 780 and 1159, the Court excluded evidence clearly showing that R.C.A. recognized co-conspirator Hale as a "key account" in the San Francisco area; and in excluding Pl. Ex. for Id. Nos. 1165-1169, the Court excluded evidence of Hale's special treatment by R.C.A. with respect to special advertising funds. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
780, 1159	hearsay, irrelevant, no foundation (Tr. 4648-4650)	Tr. 4650
1165-1169	same (Tr. 4952-4954)	Tr. 4954

a. Ex. Nos. 780 and 1159 are interrelated; No. 780 is a letter from a representative of Meyer to an officer of R.C.A., stating that retailers Hale and Macy's in San Francisco were "key accounts" for R.C.A. products, and noting that the distributor (Meyer) was requesting the factory to forgive these stores for submitting certain advertising claims in possible violation of F.T.C. Regulations. Ex. No. 1159 is the response

of R.C.A. to that request, stating that R.C.A. would forgive the mistakes of these two retailers, and honor their advertising claims.

b. Ex. Nos. 1165-1169 indicate that requests for special promotional allowances for co-conspirator Hale were forwarded to R.C.A. by the distributor and honored by R.C.A., concerning certain in-store promotional expenditures by Hale, stating that the allowance should be made after an "agreement" had been reached between representatives of Hale and Meyer.

6. The Court excluded deposition testimony of Mr. Meyer to the effect that co-conspirator Meyer had strongly protested to R.C.A. concerning sales of R.C.A. televisions to a "Spiegel Outlet" store, because that store was advertising such products in San Francisco newspapers, at prices below R.C.A.'s list prices, and noting that because of such ads, Meyer had been subjected to pressures and protests from R.C.A. dealers.

Mr. Meyer's testimony appears at deposition Tr. 20-23, 24-25, 26:14-15, 27-30, 31:2-17, 32:4-20, 32:21-33:17, 33:18-23. The Court refused to admit this testimony on the ground of lack of relevancy (Tr. 4415-4418, 4499). The correspondence was offered as Pl. Ex. for Id. Nos. 783 and 784 (being Ex. Nos. 1 and 2 in the Meyer deposition), which were rejected on the Court's own motion as being irrelevant (Tr. 4416-4418).

a. Ex. No. 783 is a letter dated July 22, 1957 from a representative of Spiegel, stating that it is Spiegel's information that R.C.A. was not fair traded; the letter obviously reflects a response to some protest to Spiegel that it cease selling R.C.A. products below suggested list prices.

Ex. No. 784 is a letter dated July 19, 1958 to Mr. Maag (Vice-President and Western Sales Manager for R.C.A.) from Mr. Henry of Meyer, forwarding a copy of the Spiegel "price-cutting" advertisement on R.C.A. products which had run in the San Francisco Call-Bulletin newspaper, and registering the protest of the distributor at this practice.

b. In the deposition testimony of Mr. Meyer upon the Spiegel situation, he identified the recipient of Ex. No. 783 as a former attorney for Meyer; stated that he had ascertained that Spiegel obtained R.C.A. merchandise from Chicago (somebody, either from Meyer or R.C.A. obtained this information from Spiegel); that he recalled that his Sales Manager, Mr. Henry, discussed the Spiegel matter with sales representatives of R.C.A.; that in the normal course of business, he would have instructed Mr. Henry to bring the Spiegel advertising matter to the attention of R.C.A.; and that he had requested his attorney to write Spiegel a letter with respect to their advertising.

7. The Court excluded the deposition testimony of Mr. Maag, former Vice-President of R.C.A., to the effect that R.C.A. received protests concerning the "Spiegel Outlet" situation referred to above, from its distributor.

The deposition testimony of Mr. Maag appears at deposition Tr. 89-91, 92, and 93-95. Objections were made to this testimony as being hearsay, irrelevant, and not the best evidence, which objections were sustained (Tr. 4622-4625; see 4626-4628, and 4715-4719).

a. In his deposition, Mr. Maag stated that he recalled the "Spiegel Outlet" store incident and receiving the



letter from Meyer; and that he recalled that the retail stores in San Francisco were upset concerning the Spiegel advertisement in the San Francisco newspaper listing prices below the suggested list prices. He recalled that some of the retailers had returned R.C.A. products after the incident.

8. The Court excluded a statement by Mr. Saxon, a Vice-President of appellee, made in his deposition, to the effect that his company did not engage in price competition in the sale of television sets. The statement is contained at deposition Tr. 131:2-21. The Court's ruling is at Tr. 4522-4524.

9. In excluding Pl. Ex. for Id. Nos. 363, 364 and 365, the Court excluded evidence that R.C.A. had direct knowledge of the purposes, actions, and names of members of the San Francisco "Better Business Bureau"; and of the position of authority in that organization of Mr. Lachman, officer of co-conspirator Lachman Bros. These exhibits were used in the deposition of Mr. Meyer, and foundational testimony concerning them was read into the record at Tr. 4496-4497. When the exhibits were offered into evidence, they were objected to as being irrelevant and consisting of hearsay, which was sustained (Tr. 4747).

a. Ex. Nos. 363, 364 and 365 consist of correspondence dated August 1957, between officers of co-conspirator Meyer relative to the R.C.A. Service Division's plan to quit the San Francisco "Better Business Bureau"; correspondence from Mr. Lachman (on behalf of B.B.B.) to Mr. Meyer requesting him to do what he could to keep that company in the association; and a letter from Meyer to R.C.A. concerning the situation and stressing



the importance of Mr. Lachman in the San Francisco retail market, and suggesting that steps be taken to maintain the membership.

E. Evidence Pertaining To Appellee Whirlpool:

1. The Court excluded Pl. Ex. for Id. No. 5086, evidence that appellees R.C.A. and Whirlpool had common directors.

Ex. No. 5086 was objected to as being irrelevant, which was sustained (Tr. 5161-5162). This Exhibit is Whirlpool's answer to appellants' interrogatory, stating that Mr. Folsom and Mr. Odorizzi served as directors of both companies.

2. The Court rejected Pl. Ex. for Id. No. 1714, evidence that appellants' written request for Whirlpool products sent to appellee, was personally brought to the attention of Meyer (local Whirlpool distributor) by a letter to Meyer from Mr. S. Golden, a senior officer of Whirlpool. It was stipulated that Ex. No. 1714 was authentic (Tr. 5144); but it was objected to as lacking relevancy and foundation, which was sustained (Tr. 5146-5147).

3. The Court excluded Pl. Ex. for Id. No. 5077, containing evidence of direct and preferential treatment given co-conspirator Hale by Whirlpool, and of Whirlpool's direct involvement in the local retail market. This Exhibit was objected to as irrelevant, which was sustained (Tr. 5054-5055).

a. Ex. No. 5077 (A-D) is a report of a Meyer Whirlpool salesman, of his discussion with Mr. S. Golden of Whirlpool about Hale's need for additional factory advertising funds, in order for it to carry a "full line" of Whirlpool goods; and also about the franchising of "Bay Mart" (a discount store

in San Jose) with Whirlpool products; and his discussions of the retail price structure on freezers with various retailer representatives.

F. Evidence Pertaining To Appellees Frigidaire And Frigidaire Sales:

(Appellees admit that Frigidaire Sales is a wholly-owned subsidiary of General Motors, R. 6,51. Appellees are collectively referred to as "Frigidaire", except where otherwise noted.)

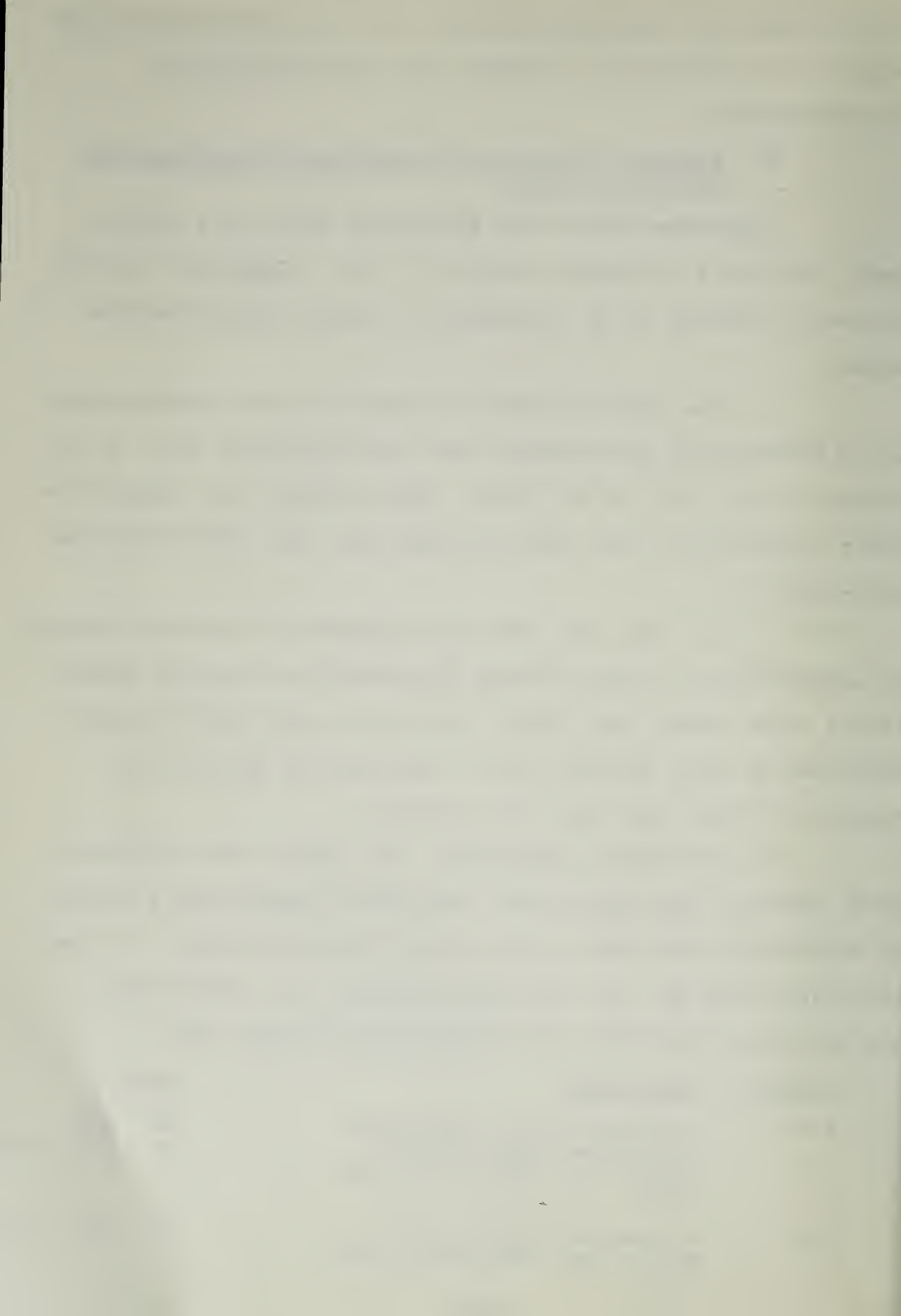
1. The Court excluded evidence of direct preferential and discriminatory arrangements with co-conspirator Hale, in excluding Pl. Ex. for Id. No. 1985. This evidence was rejected as being irrelevant at that point in the trial (Tr. 4258-4259; see 4256-4260).

a. Ex. No. 1985 are Frigidaire "Quarterly Reports" of expenditures to retail dealer advertising and special promotional funds (model year 1958), showing it paid 100% of claims submitted by Hale, Lachman Bros., Sterling and Redlick upon "special fund(s)" and "key city fund(s)".

2. The Court excluded Pl. Ex. for Id. Nos. 4170 and 4178, evidence that after 1961, Frigidaire established a policy of maintaining its retail list prices in San Francisco. (It was stipulated that Ex. No. 4170 was authentic. Tr. 1557-1558).

The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4170	irrelevant (Tr. 1558-1559) cumulative (Court's own motion; Tr. 1895-1911; 4097- 4104)	Tr. 1559 Tr. 1911, 410
4178	cumulative (Court's own motion; Tr. 1895-1911; 4097- 4104)	Tr. 1911, 410



a. Ex. Nos. 4170 and 4178 are Frigidaire price sheets from the Lachman and Redlick "price books", respectively. Ex. No. 4178 contains pencilled-in list prices indicating that the retailer obtained these from Frigidaire. Ex. No. 4170 shows the same pencilled-in list prices, as well as pencilled list prices "with trade" identical to those in Ex. No. 4178 (for an earlier period).

G. Evidence Pertaining To Appellees Maytag, And Maytag West Coast:

(It was conceded that Maytag West Coast was the wholly-owned distributing arm of Maytag, (R. 1915), thus all references here to "Maytag" or "appellee" include both, unless otherwise specified.)

1. The Court excluded Pl. Ex. for Id. No. 565, showing that Maytag directed appellants not to advertise Maytag appliances with prices listed in such advertisements. This Exhibit was objected to for lack of foundation, which objection was sustained. (Tr. 3341-3343).

a. Ex. No. 565 is a hand-written memorandum on Maytag letterhead given to Manfree by Mr. Fenn Wilson of Maytag West Coast, authorizing appellant to receive Maytag advertising credits on the condition that "no prices" would be shown on appellants' advertising of Maytag products.

2. The Court denied appellants' offer of the testimony of Mr. Bernard Freeman that he had been told by Mr. J. T. Mitchel, Regional Manager of Maytag West Coast, that his company would no longer sell products to Manfree, because it was no longer going to sell to discount stores in San Francisco due to

a change in its policies.

Appellants began introduction of this testimony at Tr. 6059; however, previously appellee had objected to any evidence relating to Maytag or Maytag West Coast prior to April 9, 1959, based on appellants' answer to Maytag Interrogatory No. 9 (appellee's interrogatory appears at R. 728, 731; appellants' answer at R. 958, 961), stating, in part:

"Answer to Interrogatory No. 9:

(a) The conspiracy to which Maytag became a member on April 30, 1959 was commenced prior to that time, and is known to plaintiffs to have existed in May 1957. Plaintiffs do not know of the existence of any formal agreement or contract evidencing the conspiracy. But it refers defendants to all agreements and contracts with the defendants in this action, including the price sheets given defendant retailers by the vendor defendants, franchise agreements with certain retail defendants, the purchase order with Hales for \$10,848.49 dated just prior to April, 1959 (in March)"

The Court then ruled as follows (Tr. 5784):

"All right, all testimony, then, with relation to acts and declarations of Maytag or its representatives prior to, was it, April 9, 1959 will be excluded."

(See Tr. 5781-5785).

Appellants' offer of the testimony concerning the Mitchel conversation was rejected by the Court, based on its ruling above, because it took place prior to April 9, 1959. (See Tr. 5785-5788; 6059-6064).

3. The Court excluded Pl. Ex. for Id. No. 4165, showing written comments by representatives of Maytag West Coast concerning Manfree's written request to appellee in 1961, for

the right to buy Maytag products.

When Ex. No. 4165 was offered, it was rejected by the Court until such time as "things are tied up" (Tr. 3354; see Tr. 3351-3354). It was offered again in connection with the testimony of Mr. Freeman, and was objected to as cumulative and without foundation, which objections were sustained. (Tr. 5791-5792).

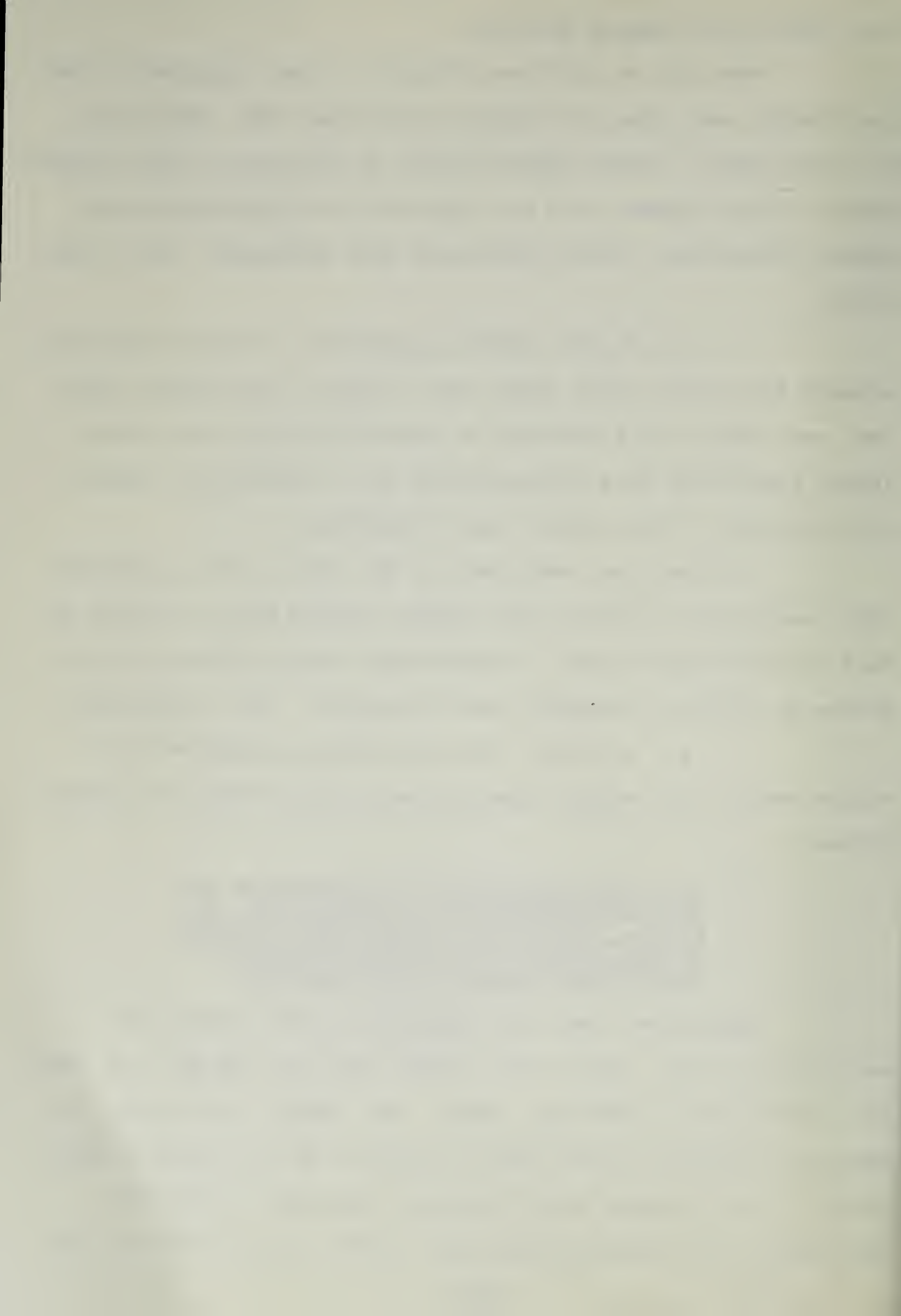
a. Ex. No. 4165 is appellant's letter requesting product from Maytag West Coast sent in 1961, received by appellee, and containing a notation in handwriting that the letter stated appellants were discontinuing the "closed-door" policy, and wondering if the lawsuit was to continue.

4. The Court excluded Pl. Ex. for Id. Nos. 1079 and 1089, containing evidence that Maytag allowed special prices to Hale on Maytag appliances. Objections to these exhibits by appellee as lacking foundation were sustained. (Tr. 1120-1122).

a. Ex. Nos. 1079 and 1089 are appellee's invoices noting that Maytag freezers were sold to Hale at "special prices".

H. Material Portions Of The Deposition Of The Deceased Officer Of Appellants, Mr. Alpine, Concerning Reasons For Refusals To Deal Given Him By Appellee And Co-Conspirator Vendors, Were Excluded

Defendants took the deposition of Mr. Alpine on March 15-16, 1961; April 3-4-5, 1961; May 1-2, and May 3-4, 1961. Mr. Alpine died in February, 1962. (Tr. 6223). Initially, all appellees objected to the use of any part of Mr. Alpine's deposition on the grounds that it was not complete; as various memoranda of his conversations with vendor representatives were



not produced by appellants until after defendants' motion for the production of them had been granted, after Mr. Alpine's death. (Tr. 5204; see 5196-5205). Also see the objections summarized in Motion to Suppress Asserted Deposition of Mr. Arthur Alpine (R. 1325) and supporting Memorandum (R. 1326). The Court's initial ruling was as follows:

"THE COURT: Those portions which were dependent upon assistance of the Court for the purpose of getting memos as to which some cross-examination may have been needed or required, I would be disposed not to permit that..." (Tr. 5200)

Appellees' further objections to the deposition, on the ground of lack of opportunity to cross-examine the deponent concerning the memoranda, and further objections as to relevancy and hearsay, were interposed (Tr. 6213-6233). The Court observed at this time:

"... In other words, while I am satisfied that under the applicable law it is proper for me to permit the reading of the deposition of Mr. Alpine, I do so only provided that there are proper safeguards which guarantee a fairness in the presentation and an opportunity to cross-examine with relation to matters that may not have been completed and as to which there was no cross-examination...." (Tr. 6125)

* * * *

"THE COURT: All right, then I am going to rule that I am not going to permit testimony with relation to conversations as to which a memorandum was made by the witness at the time. Any other conversations will go in." (Tr. 6224-6225)

See, also, Tr. 6229-6230.

At a further hearing, appellees once again interposed their objections to the testimony on the grounds of their failure

to have cross-examination of the deponent upon the memoranda. (Tr. 6245-6247, 6250-6251; see Tr. 6243-6279). The Court proceeded to reject testimony of all conversations where such memoranda were involved. (Tr. 6253-6277). Thereafter, the following colloquy between the Court and counsel for appellants took place:

"MR. KEITH: Your Honor, I believe that after these rulings we would withdraw--rather, not read any portion of the deposition of Mr. Alpine.

"THE COURT: Well, that is about what I was going to ask you, Mr. Keith, in view of the rulings of the Court, if you want to read any further portions of the deposition.

"MR. KEITH: Of course the record will show that we believe this prejudicial to the plaintiffs' case.

"THE COURT: Yes, the record will so show." (Tr. 6277)

The excluded deposition testimony of Mr. Alpine is summarized as follows:

a. Conversations with representatives of G.E.:

Alpine had a luncheon meeting with Mr. Bernard Meseth of G.E., attended by Mr. Bernard Freeman and Mr. Williamson of Manfree, where Alpine offered to buy five carloads of G.E. merchandise. Meseth replied that he could not sell such products to appellants at that time, because of pressure from his other accounts, and because of the G.E. "dealer structureship." When Alpine said this left him no alternative but to transship, Meseth asked him not to do so, and said he would give a definite answer within thirty days. When Alpine subsequently called Meseth, the latter replied that the situation was unchanged. (See

deposition, Tr. 172-181; see Tr. 6253-6254; Pl. Ex. for Id. Nos. 503-A, 503-B, and 508.)

b. Conversations with representatives of appellee Maytag: Alpine recalled several conversations with Mr. Mitchel, from Maytag West Coast. At first, (when Manfree had Maytag products) Mitchel told him appellants were considered one of Maytag's better Northern California accounts. At a later conversation, Mitchell told him that Maytag had had a "change of policy" and that it would not be able to sell to appellants anymore. (Deposition testimony, Tr. 235-238; see Tr. 6257, and Pl. Ex. for Id. Nos. 557 and 558.)

c. Conversations with representatives of Frigidaire: Mr. Alpine recalled having a conversation with Mr. John Shaw of Frigidaire at appellants' premises where Alpine asked for the complete Frigidaire line and said he was ready to order a carload of such products. Shaw replied that Frigidaire thought they might go into the business of selling to discount stores, as Frigidaire felt it should have 25% of the local market but did not, and selling to discount stores might be the way to get such market share; however, Manfree was never able to obtain Frigidaire products. (See deposition testimony Tr. 211-212; 431-436; and see Tr. 6255-6256, 6268; and Pl. Ex. for Id. Nos. 484, 485, and 489.)

d. Conversations with representatives of California Electric: Alpine recalled a conversation with John Muntain, where Muntain told him that he was receiving pressure from his bosses because California Electric was selling to Manfree, as his bosses in turn were receiving pressure from

"their Mission (Street) accounts." (Deposition testimony Tr. 279-280). He testified that Mr. Muntain also repeatedly turned down appellants' requests for co-operative advertising funds in order to advertise Philco products (Deposition testimony Tr. 418). After appellants sent a letter dated June 24, 1960 to appellee requesting permission to purchase Philco appliances, Alpine recalled that Mr. Weaver, from California Electric, called and asked him if he wanted to purchase a carload of merchandise. When Alpine said "yes," Weaver replied that his company didn't have enough merchandise, nor would appellants be able to get "carload prices" on it. (Deposition testimony, Tr. 569-573). Also, see Tr. 6261, 6264-6267, 6271-6274; and Pl. Ex. for Id. Nos. 1776, 1777 and 1778.)

e. Conversation with representatives of Borg-

Warner: Alpine testified concerning a meeting with a man identified as a representative from Borg-Warner Credit Corporation in 1957, where he asked him to try to get co-conspirator Lancaster, the Borg-Warner distributor, to sell to appellants. (Deposition testimony, Tr. 192-196; also, see Tr. 6234-6235.)

f. Conversations with representatives of

Graybar: Alpine recalled a conversation with either Ray Dickson or Rod Hall, representing Graybar, at the appellants' premises, where the Graybar man noted that his company had not had success selling Hotpoint products to the major retailers, so, having nothing to lose, they were going to sell Hotpoint products to discount houses. He later had a conversation with Mr. Mayben, Sales Manager for Graybar in October, 1958, also at the store premises, when Mr. Mayben told him that Graybar would no longer

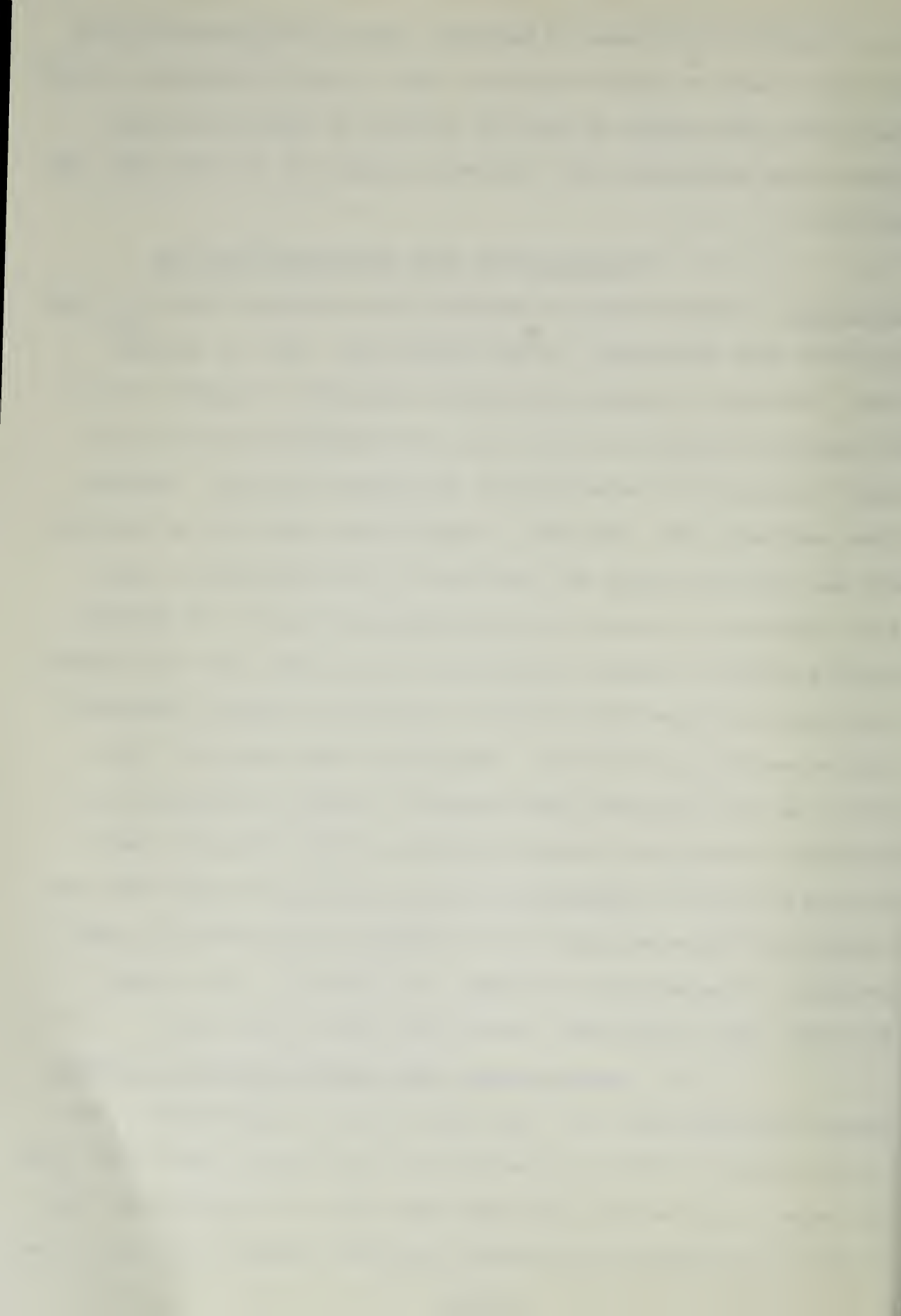
sell Hotpoint appliances to Manfree, because Graybar was going to try to sell to major retailers, and it didn't believe it could penetrate this market as long as it sold to discount houses. (Deposition testimony, Tr. 244-249; see Pl. Ex. for Id. Nos. 498 and 500.)

g. Conversations with representatives of

Lancaster: Alpine recalled numerous conversations with Mr. Jack Mitchell from Lancaster, in the period May, 1957 to October, 1957. Fifteen to twenty days before Lancaster stopped selling to Manfree, Mitchell told him that the Manfree account wasn't worth keeping and "jeopardizing" his other accounts. (Deposition testimony, Tr. 216-219). Alpine also asked Mr. Al Schmidt, who was selling radios for Lancaster, and attempting to sell such products to another concessionaire of U.S.E., if Schmidt would attempt to regain the Motorola television line for Manfree from Lancaster; and that Schmidt promised on several occasions that he would try to do so. (Deposition testimony, Tr. 265-267.) He also recalled that Mitchell refused to provide co-operative advertising money to Manfree, while Lancaster was selling products to appellant, because Mitchell stated that his company did not want any U.S.E. newspaper advertising of such products. (Deposition testimony, Tr. 416-417). See, also, Tr. 6256, 6261, 6264-6267; and Pl. Ex. for Id. No. 550.

h. Conversations with representatives of Meyer:

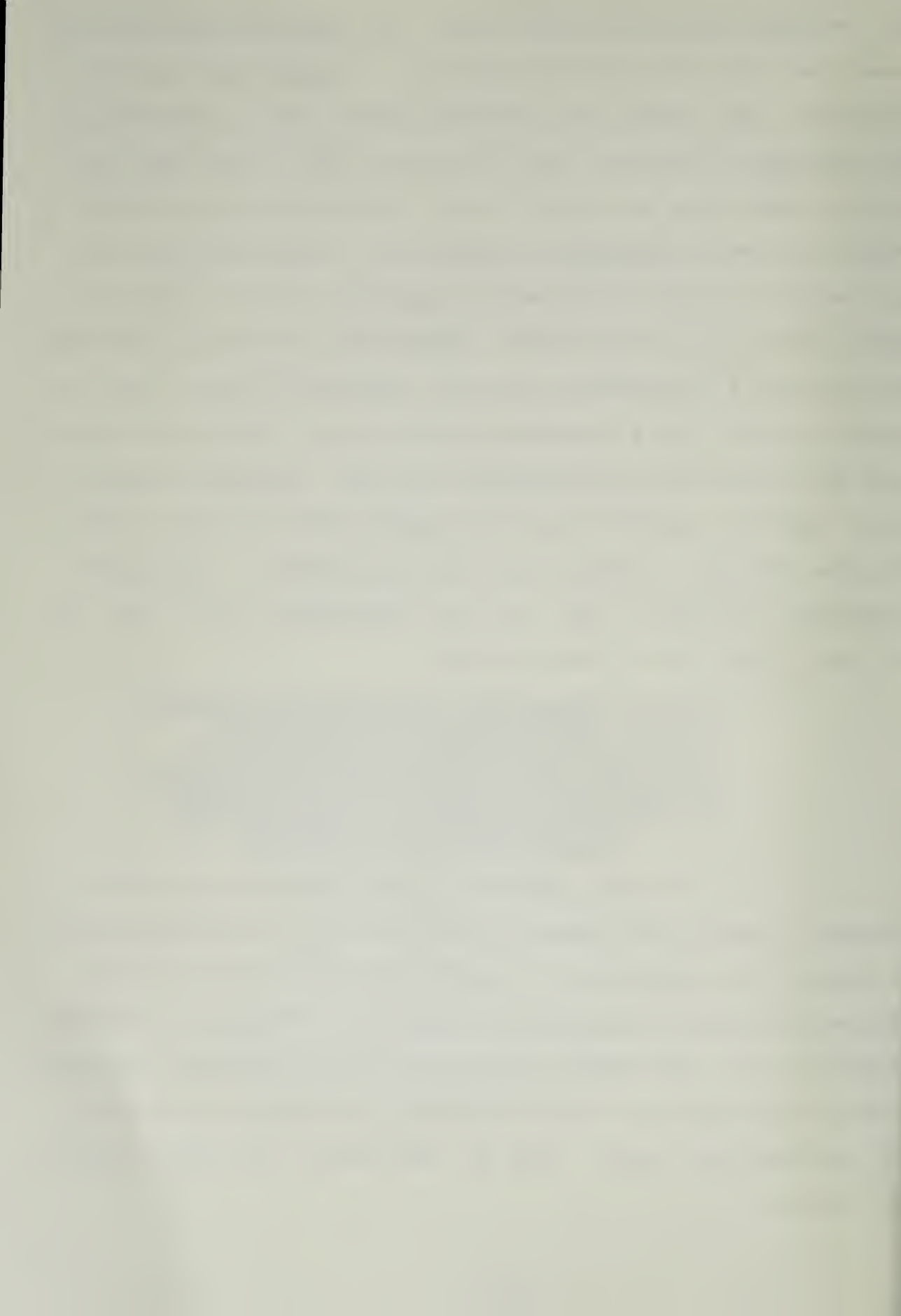
Alpine testified that Mr. Jack Smith came to appellants' store in the summer of 1957, stated that he was selling the R.C.A. line for Meyer, that he had just come from the Los Angeles area, and could not understand why Manfree could not obtain the R.C.A. line,



as "everyone had it" in Los Angeles. He assured Alpine that he would get the R.C.A. line for Manfree. (Deposition testimony, 253-255.) Mr. Alpine also received notice from Mr. Herb Wolff, an employee of Manfree, that in January, 1960, Meyer gave the R.C.A. radio line to another U.S.E. concessionaire, and told Wolff they were interested in seeing the results of that move, and were sure that in six months appellants would get the complete R.C.A. line of products. (Deposition testimony, 267-268). He also had a conversation with Mr. Erickson of Meyer, when he asked Erickson for a franchise for the R.C.A. electronics line, and for co-operative advertising funds for newspaper advertising. Erickson replied that this request would be sent to the "proper parties." Alpine heard nothing further. (Deposition testimony, 278-279). See, also, Tr. 6260-6261; and Pl. Ex. for Id. Nos. 1683, 1684, 1685 and 1686.

I. Further Substantial and Material Evidence Showing Establishment Of A Conspiracy Between The Appellee And Co-Conspirator Retailers, Distributors, and Manufacturers To Control Market Entry In The Retailing Of The Subject Products In San Francisco, Was Excluded, Or Not Applied

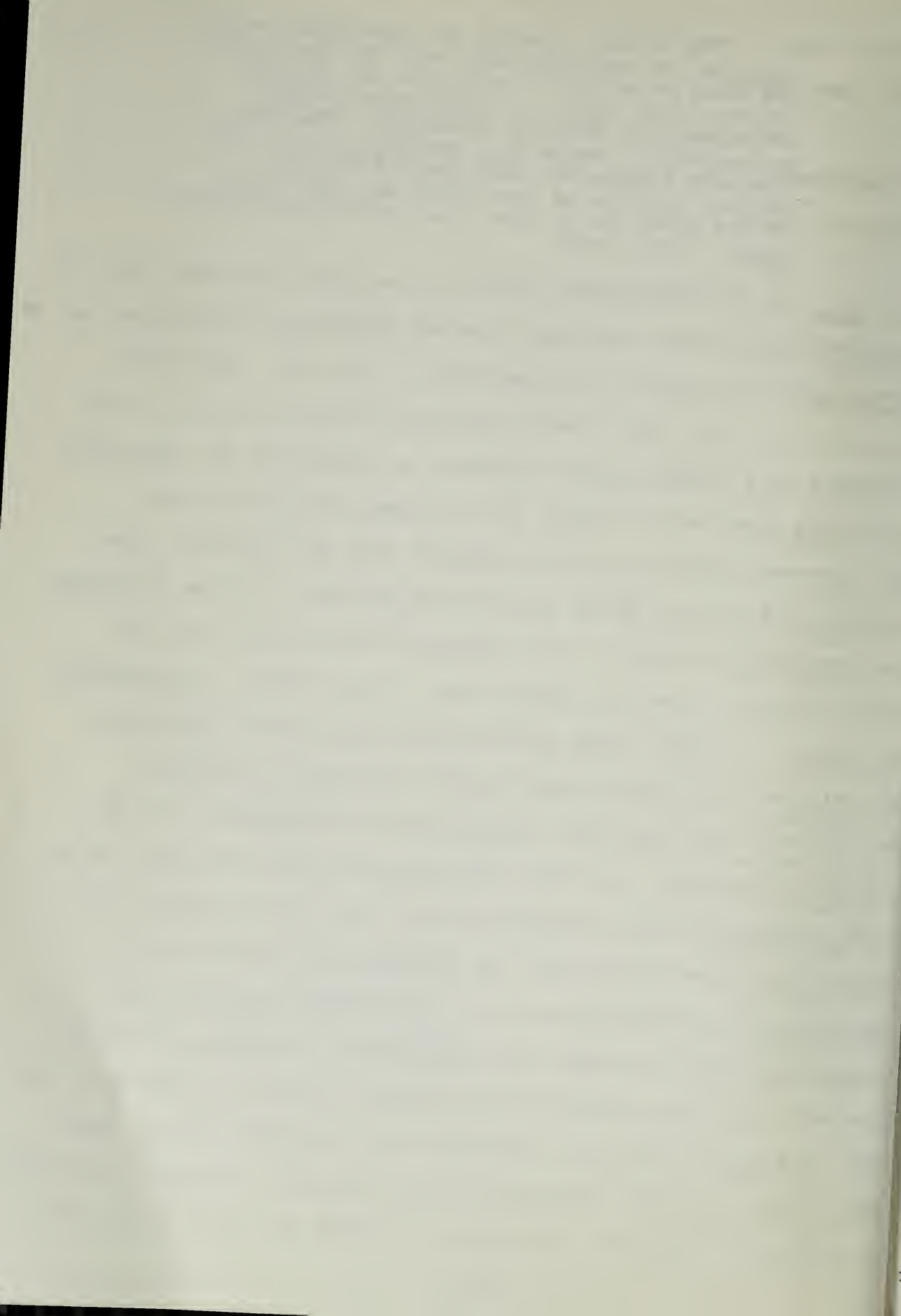
1. The Court refused to apply the testimony of Mr. B. Freeman, relating the reasons given him by Mr. Jack Mitchell of co-conspirator Lancaster, as to why Lancaster would not sell Norge appliances to appellant Manfree. Mr. Freeman's testimony appears at Tr. 5804-5809; objections to such testimony were made that it was hearsay, lacked foundation, and that no connection or relevancy was shown. (See Tr. 5804-5805). The Court ruled as follows:



"THE COURT: Ladies and gentlemen, with relation to conversations with Mr. Mitchell, the same principle I indicated to you previously will apply. I will permit these conversations with Mr. Mitchell. They may be hearsay in character, and whether or not they are admissible will depend on such further rulings as the Court may make later in the trial or at the close of the Plaintiff's case." (Tr. 5805).

In its Memorandum Opinion, the Court indicated that it would not apply this testimony against appellees Borg-Warner or Norge Sales (or any of the appellees). (R. 1912, 1963-1964).

a. Mr. Freeman testified that he knew Mr. Jack Mitchell as a Norge product salesman in charge of the territory including appellants' store, for co-conspirator Lancaster. Mr. Freeman recalled several meetings with Mr. Mitchell concerning the sale of Norge products by Manfree: at one of these, he requested Mitchell to give Manfree advertising money for Norge products, and was turned down. (Tr. 5807). In September or October of 1957, after making many phone calls requesting Mr. Mitchell to come by and discuss the sale of products, Mr. Mitchell met with Mr. Freeman and Mr. Williamson (an employee of Manfree), at which time Freeman asked Mitchell why he hadn't replied to the telephone calls, and why he hadn't responded to orders sent over the telephone by Williamson to Lancaster for Norge appliances. Mr. Mitchell replied that Lancaster would no longer sell appliances to Manfree, because Lancaster had been subjected to pressure from co-conspirator Hale not to sell to appellants, and that if Lancaster did so, Hale would not buy Norge appliances from Lancaster. He also described a meeting of Lancaster officials, at which Mr. W. J. Lancaster



stated that his company would no longer sell to appellants.
(Tr. 5808-5809).

2. The Court excluded the testimony of Mr. Marvin Boyd of Manfree concerning the refusals of certain vendor co-conspirators to deal with appellants.

Objections to such testimony of a conversation with Mr. Newby, a sales manager for co-conspirator Westinghouse, were objected to as being irrelevant; and the Court excluded the testimony on the grounds of lack of foundation (Tr. 5624-5630; see Tr. 5539-5540, and Tr. 5553-5554.)

Mr. Boyd's testimony concerning a conversation with Mr. Erickson, of co-conspirator Meyer, was objected to as being hearsay, and lacking a showing of authority on behalf of the declarant to bind his principal, which objections were sustained (Tr. 5601-5607; see Tr. 5541-5542, 5538-5543, and 5556-5557).

a. Boyd's testimony was that he requested the Westinghouse line from Mr. Newby after Westinghouse had received Manfree's letter of request. Newby replied he could not authorize such sales as it "wasn't his decision". The testimony concerning his conversation with Erickson was to the effect that he met Erickson at a Meyer "Trade Show" to which appellants had been invited, and requested the Whirlpool and R.C.A. lines, but was told by Erickson that "no one was there" who could "take an order" from appellants.

3. The Court excluded Pl. Ex. for Id. Nos. 787, 788, 789 and 790, containing evidence that co-conspirator Meyer investigated the sources of R.C.A. television sets being sold by discount stores in Northern California. These Exhibits were



objected to as being hearsay, and lacking relevancy and foundation, which objections were sustained (TR. 1019-1023; 4501-4503; 4924-4928).

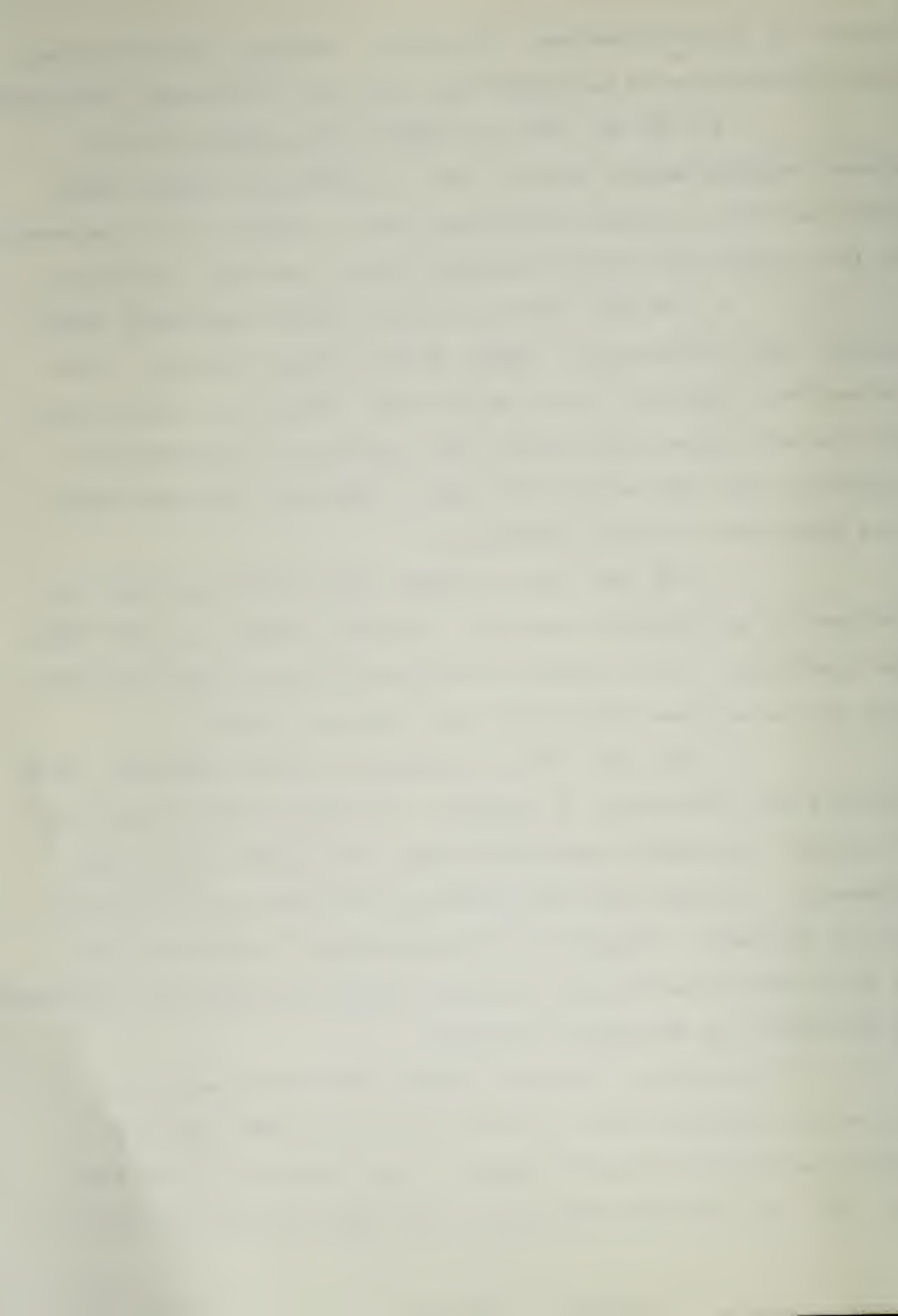
a. Ex. No. 787 is a Meyer intra-company letter between managing agents (March, 1957), questioning whether Meyer should sell R.C.A.-Victor television sets to "Wilson's" in Sacramento who the letter notes owns a discount store in Northern California.

b. Ex. No. 788 is an inter-office memorandum dated January, 1958, requesting a report of the sources of R.C.A. televisions being sold at "C.B.S. in Concord", California; noting that this discount store could obtain such products by transshipping; suggesting that this store sold under a different name with deliveries being made to avoid detection.

c. Ex. No. 789 is a Meyer memorandum from its vice-president to all district managers, requiring reports of all "card-type operations", with listing of nationally-known brands of appliances and televisions carried by such discount stores.

d. Ex. No. 790 is a memorandum dated September, 1958 observing that "Wilson's" (a, above), was going to take over "C.B.S. in Concord", and would undoubtedly ship R.C.A. goods there from Sacramento. It also notes the opening of the "You Save" discount store in San Mateo, directing an investigation by Meyer to find out what merchandise it was carrying, (noting the store had requested R.C.A.-Victor and Whirlpool products).

4. The Court excluded evidence that co-conspirator Westinghouse believed that it could not sell to both large department stores and discount stores in San Francisco at the same time; and that co-conspirator Macy's had requested that there be no



The Court rejected the offer of proof of the testimony of Mr. Hangauer, District Manager of Westinghouse, following objections on the grounds of irrelevancy, hearsay, and calling for an opinion and conclusion. (Tr. 6163, 6176-6177; see Tr. 6127-6133). The Court also excluded Pl. Ex. for Id. Nos. 352(A-B), 479, 480 and 481, pertaining to the same subject matters. The grounds of objection and the transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
481	hearsay, irrelevant, no foundation (Tr. 6147-6148) same (Tr. 6149-6152)	Tr. 6148 (sufficient foundation)
479, 480, 352	hearsay, irrelevant (Tr. 6152-6158)	Tr. 6158

a. Mr. Hangauer would have testified that when he came to San Francisco as General Manager for Westinghouse, from market conditions it was apparent to him that he could not sell his company's products to large specialty appliance, department, and furniture stores, if Westinghouse sold products to the discount stores.

b. Ex. No. 352 is a Westinghouse memorandum dated October, 1962, as a report from Hangauer to the "Regional Manager" mentioning complaints from Macy's and other large retailers about the Westinghouse prices, and reporting statements from retailers that they cannot compete on many Westinghouse products.

Ex. No. 479 is a similar memorandum dated August, 1962, noting comparative G.E., Frigidaire, and Norge prices, and mentioning co-conspirators Macy's and Lachman Bros. as "key accounts", and further noting that neither Frigidaire nor G.E.



would sell to discount houses, and that the R.C.A. distributor had cancelled G.E.M. (a discount store) when the latter brought R.C.A. products in from San Jose for its San Francisco store opening; stating that an R.C.A. representative told him that one couldn't sell to discounters and still obtain cooperation from "key and large T. V. outlets".

Ex. No. 480 is a similar memorandum, dated October, 1962, reporting that in San Francisco, the major appliance business was dominated by such "specialty houses" as Hale, but noting a T. V. sales trend toward "discount houses".

Ex. No. 481 is a similar report of May, 1962, reporting that Westinghouse was openly and actively promoting discount houses in Santa Clara, San Mateo, and San Francisco Counties, but had taken the position that it was going to do business with "key accounts", and limit its distribution to this kind of store, while realizing that under such circumstances, Westinghouse would have to decide "which way to go".

5. The Court excluded the offered testimony of Mr. Marvin Boyd concerning Manfree's attempts to obtain major appliances from Southern California sources. When this testimony was offered, it was objected to as hearsay and immaterial, and after the testimony was permitted over such objection, it was stricken by the Court as hearsay. (Tr. 5569-5571).

a. The stricken testimony was that Mr. Boyd had attempted to obtain Hotpoint products from a discount store in Los Angeles, because of Manfree's inability to get such products locally.

6. The Court excluded evidence that appellee and



co-conspirator vendors sold their major appliances and television sets to other discount stores in Northern California, situated outside of San Francisco.

The Court refused to permit appellants to interrogate the witness Mr. Mayben, representative of co-conspirator Graybar (distributor of Hotpoint) concerning conversations with Hotpoint representatives relative to franchising White Front Discount Stores for Hotpoint goods. (Tr. 3199-3202).

The Court also excluded Pl. Ex. for Id. Nos. 4079, 4080, 4082, 4083, 4084, 4085, 4108, 4266, and 5052, relating to the same subject matter. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4266, 5052	irrelevant (Tr. 5457)	Tr. 5457
4084	irrelevant, no foundation (Tr. 2781-2789)	Tr. 2789
4085		Tr. 2859-2861 (Court's own motion)
4079, 4080, 4082, 4083, 4108	hearsay, irrelevant (Tr. 2623- 2630)	Tr. 2630 (founda- tion established)

a. Ex. Nos. 4079, 4080, 4082, 4083, and 4108 are monthly sales reports for the periods 1963-1964, showing continual, substantial sales by Lancaster of Norge appliances to the White Front Discount Stores in the San Francisco Bay Area, and a Lancaster desk "order card" showing various discount store in the San Francisco Bay Area (outside of San Francisco proper) as being customers for Norge products.

b. Ex. Nos. 4084 and 4085 are, respectively,



reports of Lancaster sales of Norge appliances (1960, 1961) and Lancaster sales of Motorola appliances to "WASCO", a small retailer in the San Francisco Bay Area, opened by Manfree's ex-manager.

c. Ex. Nos. 4266 and 5052 (A-B) are, respectively a Hotpoint district salesman's report showing unit sales to the G.E.M. discount stores in the Bay Area (1962 and 1963) and a Hotpoint "request for new customer record" cards as to San Francisco Bay Area White Front Discount Stores.

7. The Court excluded evidence of appellants' written request for major appliances and television sets sent to the vendor appellees and co-conspirators, and their refusals deal with appellants, as offered in Pl. Ex. for Id. Nos. 548, 1691, 1702, 1714, 1754, 1756, 1757, 1758, 1759, 1761, 1762, 1773, 1774, 1815, 1816, 1840, 3049 and 3071.

These various Exhibits consist of letters sent by appellants in June and July, 1960, to the various vendors of the products concerned, requesting that Manfree be supplied with these products; and the written responses received from certain of these vendors. The grounds for objection and transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
548	irrelevant, no foundation (Tr. 4451-4454)	Tr. 4454
1691	no foundation (Tr. 6114-6116)	Tr. 6116
1702, 1774, 1840	irrelevant (Tr. 5969-5970)	Tr. 5970
1714	no foundation, irrelevant (Tr. 5144-5150) (Stipulated to be authentic: Tr. 5114)	Tr. 5150



<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
1759, 1760, 1761, 1762	no foundation, irrelevant (Tr. 5977-5978)	Tr. 5978
3049, 3071	no foundation, irrelevant (Tr. 5592-5598)	Tr. 5598
1815, 1816, 1817	same (Tr. 5978-5979)	Tr. 5979
1773	hearsay, self-serving, irrelevant (Tr. 2621-2623)	Tr. 2623

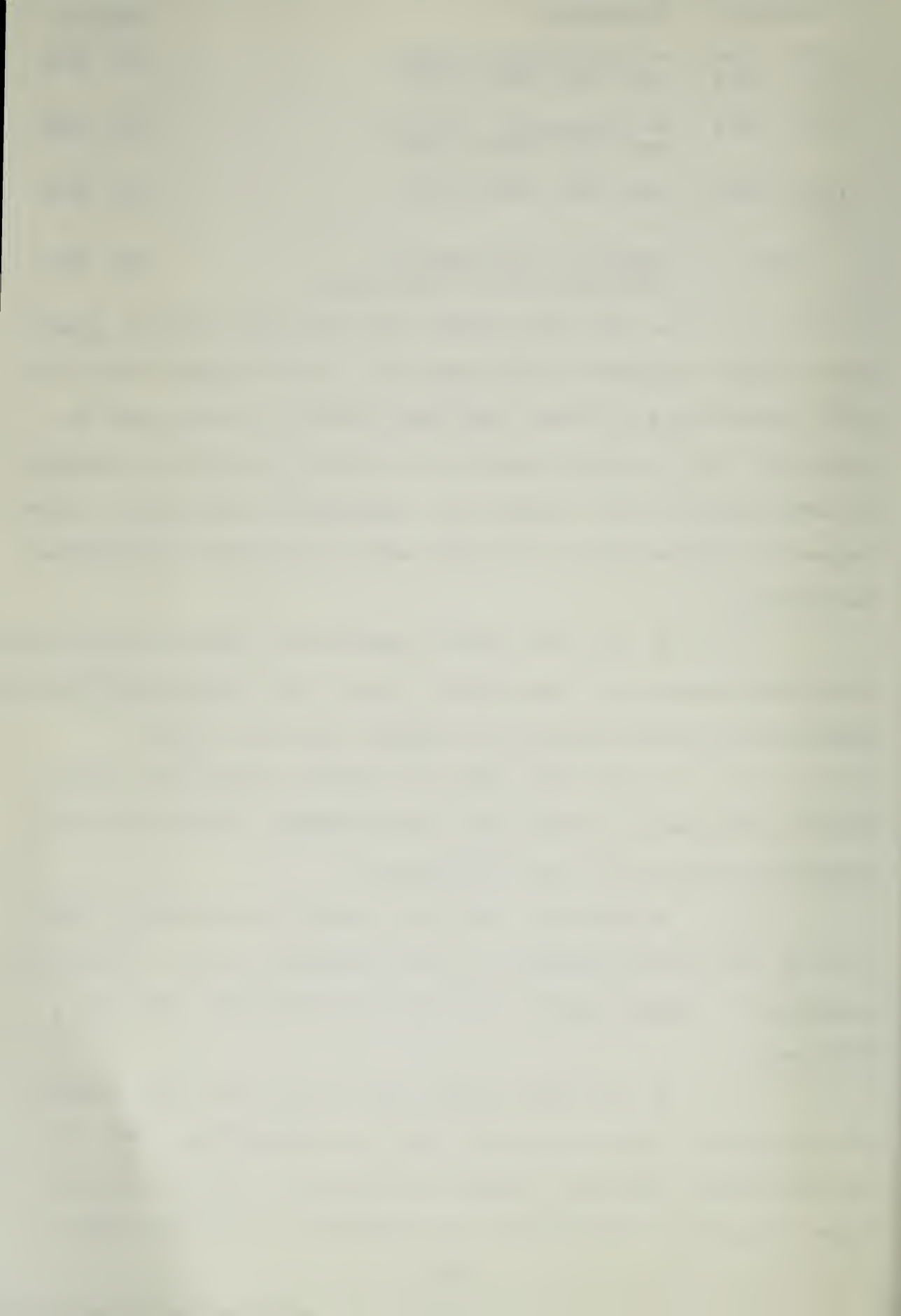
a. Ex. Nos. 1702, 1774, and 1840 concern appellants' letter request to the Cezan Co., a Los Angeles distributor, requesting all lines; its reply referring appellants to Lancaster; and a letter from R.C.A.-Victor Distributing Company of Los Angeles to Mr. Freeman (in response to appellants' letter request), stating that it did not sell to retailers in Northern California.

b. Ex. No. 548 is appellants' letter stating that they had commenced an "open-door" policy, and requesting Hotpoint appliances from co-conspirator Graybar (October, 1961).

c. Ex. No. 1691 is a letter dated July, 1960, from Mr. Alpine to the National Sales Manager, appellee R.C.A., requesting the R.C.A. line of products.

d. Ex. No. 1714 is a letter in September, 1960, from an officer of Whirlpool to co-conspirator Meyer, forwarding appellants' letter request for Whirlpool products, sent to Whirlpool.

e. Ex. Nos. 1759, 1760, 1761, and 1762 consist of appellants' letters of July, 1960, and September, 1961, to co-conspirator Motorola, requesting products; and the replies from officers of that factory to appellants, referring them to



the local distributor.

f. Ex. Nos. 1815, 1816, and 1817 consist of appellants' letters of July, 1960 and September, 1961 to co-conspirator Westinghouse, requesting the Westinghouse line of products.

g. Ex. Nos. 3049 and 3071 are, respectively, appellants' letter of July, 1960 to co-conspirator Sylvania, requesting authority to order Sylvania's products by carload lots; and letter of July, 1960 to co-conspirator Basford, requesting the Zenith line of products.

h. Ex. No. 1773 is appellants' letter of November, 1963 to Norge Sales, requesting the Norge line (Pl. Ex. No. 1775 is the reply by appellee's attorney.)

8. The Court excluded evidence showing that certain vendor appellees and co-conspirators sold small appliances to Manfree and other departments of appellant U.S.E., during the same period of time they were refusing to sell major household appliances and television sets to Manfree, in excluding Pl. Ex. for Id. Nos. 5117 and 5118, and the offer of proof of the testimony of Mr. Bernard Freeman concerning this situation.

Mr. Freeman's testimony was offered at Tr. 5857-5859, and 5863-5866. The Court rejected the offer (for irrelevancy and lack of foundation). (Tr. 5865-5866). Ex. Nos. 5117 and 5118 were objected to as being without foundation and immaterial, which were sustained (Tr. 6559-6601).

a. Mr. Freeman's proposed testimony was that Manfree, and Camrose (another U.S.E. concessionaire) were obtaining vacuum cleaners and radios from Lancaster while that



distributor was refusing to sell the subject products to Manfree as well as the further testimony on other lines of small appliances being obtained, during the period of boycott.

b. Ex. Nos. 5117 and 5118 are studies prepared by appellants showing the purchases of small appliances by concessionaire Camrose from co-conspirators Graybar and Westinghouse and appellee G.E., during the periods 1958 to 1961, and 1957 to 1964.

9. The Court excluded written evidence of attendance by the retailer co-conspirators at meetings in San Francisco concerning advertising rules to be established by them and a select group of other retail stores; and that Mr. Schreck, an officer of Sterling who attended such meetings, approached representatives of the San Francisco Call Bulletin newspaper to have it cease accepting appellants' advertising. This evidence is contained in Pl. Ex. for Id. Nos. 453, 384, 390, 391, 392-A, 393-A, 400, 403 and 404. The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
384		Tr. 382-383 (Court wrong witness)
	hearsay, irrelevant, no foundation (Tr. 1569-1599)	Tr. 1599
	same (Tr. 6595-6596)	Tr. 6596
390	hearsay, irrelevant (Tr. 383-386)	Tr. 386
391	same (Tr. 1583-1586)	Tr. 1586
	same (Tr. 2323-2325)	Tr. 2325
400	hearsay, irrelevant (Tr. 2342-2343)	Tr. 2343 (no foundation)
	irrelevant (Tr. 6595-6599)	Tr. 6599



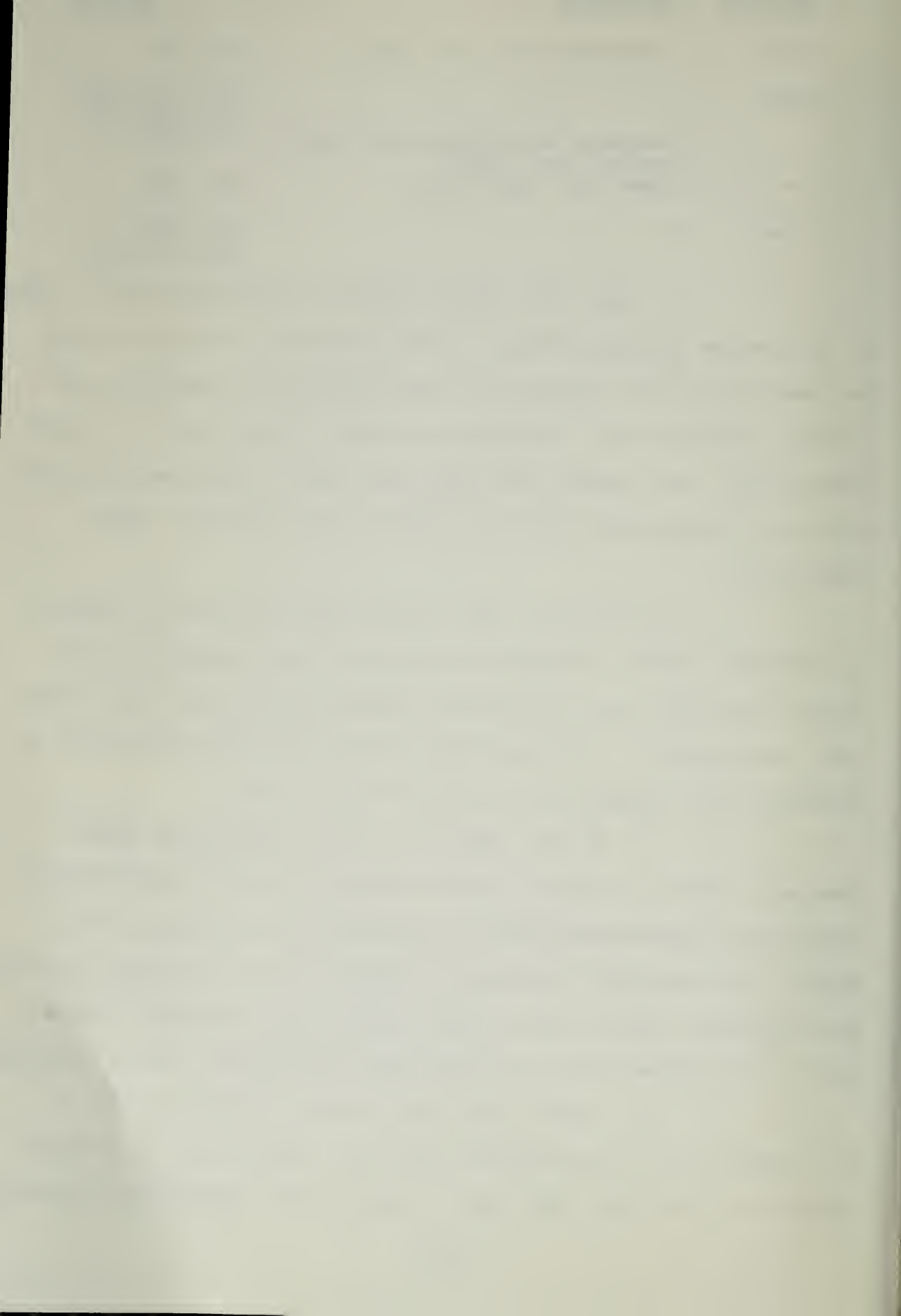
<u>Exhibit</u>	<u>Objection</u>	<u>Ruling</u>
453	irrelevant (Tr. 380-382)	Tr. 382
403		Tr. 1156-1157 (cumulative)
	hearsay, irrelevant, no foundation (Tr. 1247)	Tr. 1247
	same (Tr. 4931-4935)	Tr. 4935
404		Tr. 5694 (cumulative)

a. Ex. No. 453 is a letter dated February 9, 1959 to the Better Business Bureau of San Francisco ("B.B.B.") from Mr. Sanford of Hale stating that San Francisco retailers must jointly check out all "comparative price" claims made in retail advertising, and noting that Hale was going to discontinue such practices (complaints had been made to the B.B.B. by other retailers.)

b. Ex. No. 384 are minutes of a B.B.B. meeting in November, 1958, containing definitions and explanations of various pricing terms, including "comparative price" and "deceptive comparative", to be used by all San Francisco retailers in following the proposed B.B.B. advertising code.

c. Ex. No. 390 is a B.B.B. memorandum dated February, 1959, to members of the "Home Furnishing Advertising Committee" (representatives of co-conspirators Lachman Bros., Macy's, and Redlick) enclosing a sample letter to be sent to all San Francisco retail advertisers concerning "standards of practice" to be adopted by the local home furnishings retail industry.

d. Ex. No. 391 is a letter of March, 1959 to Mr. Redlick, of co-conspirator Redlick, concerning the matters discussed in Ex. No. 390, with a copy of the "standards" attached.



e. Ex. No. 392-A is B.B.B. letter dated May, 1959, to Mr. Lachman of co-conspirator Lachman Bros., as chairman of the advisory committee, forwarding a letter of complaint to Sterling about its advertising, and referring to similar advertising copy by Lachman Bros. that transgressed the proposed code.

f. Ex. Nos. 393 and 393(A, B) consist of correspondence from B.B.B. dated May, 1959, to Mr. Schreck, of co-conspirator Sterling, and enclosing a copy of newspaper advertising by Sterling showing a "price differential" which was against the proposed advertising code.

g. Ex. No. 400 are the minutes of the B.B.B. "advisory committee" from its meeting of March 29, 1959, discussing further the common advertising terms used by local retailers, and criticizing the advertising of the manufacturers' list price "which is not the prevailing retail price in this area."

h. Ex. No. 403 is a letter dated June, 1960 from Schreck of Sterling to Mr. Sanford, then with co-conspirator Meyer, noting it was a pleasure to have had lunch with him.

i. Ex. No. 404 is a voucher filled out by Mr. Leary, a representative of the San Francisco News Call Bulletin, noting a lunch on June 18, 1960 with Mr. Schreck and other representatives of the newspaper at the San Francisco Olympic Club, "re Sterling."

10. The Court excluded the testimony of Mr. Mittelman concerning a statement to him by a representative of the San Francisco News Call Bulletin reporting that representatives of



co-conspirator retail stores had requested that newspaper to cease accepting appellant U.S.E.'s advertising.

The offer of this testimony appears at Tr. 2123-2135. Objections were made to this testimony as being hearsay, and as being of statements made by a representative of a party not named as a co-conspirator, which objections were sustained (Tr. 2125-2134).

a. The proposed testimony was that Mr. Mittelman had been told by Mr. Wilcox, an advertising representative for the Call-Bulletin, that U.S.E. advertising could not be accepted because of pressure put on the newspaper to reject discount store advertising, by the established retail stores in San Francisco who advertised in the paper.

11. The Court excluded evidence that appellee and co-conspirator manufacturers who were members of N.E.M.A., adopted common programs with respect to definitions of and statistical reporting of sales information as to discount stores, in excluding Pl. Ex. for Id. Nos. 2093 (A,C-E), 2094 (A,C-M), 2095 (A,F-G), 3003, and 3010.

Appellants' offer of proof concerning the evidence relating to activities of N.E.M.A. appear at Tr. 6457-6470. Objections were made to this evidence as being hearsay, and without foundation and relevancy (Tr. 6466). The Court held that such evidence was not relevant (Tr. 6467, 6470).

a. Ex. Nos. 2093 and 2094 are N.E.M.A. minutes of the meetings of the Board of Directors of the Consumers Products Division (October, 1961, and October, 1962, respectively). Ex. No. 2093 discusses the "new phenomenon" of "mass



retailing", which use appliances as a "come-on" for other merchandise, noting that as the industry "shares" all individual new manufacturing techniques, the members should share all developments in "advancements in distribution" (immediately after discussing discount houses), and recommends that the Association make studies of such new developments.

Ex. No. 2094 notes that the Association decided to limit the information from its statistical reporting of sales program to N.E.M.A. members only; discusses a proposed letter from N.E.M.A. to all "mass merchandisers" to obtain from them the final destination of all appliances shipped to their outlets (to secure more information from this type of retailer to fit into the Association's county-by-county statistical sales analysis); deciding that each individual member should have its distributors obtain this information.

b. Ex. No. 2095 are minutes of an N.E.M.A. sub-committee on county operations, statistical and market analysis, for January, 1963, containing further discussion on the proposed letter from the Association to mass merchandisers (see above), deciding to have each member write its own letter to its distributors to gather such information, thus "clearing up" the problem of getting accurate sales report for N.E.M.A. statistical sales analysis.

c. Ex. No. 3010 are the minutes of Special N.E.M.A.-A.H.L.M.A. Committee on "Dealer Classifications", of January, 1962 (showing that G.E., Frigidaire, Westinghouse, Maytag, Hotpoint, Borg-Warner, and E.I.A. representatives were present), which discusses the need to improve industry

information on statistics of sales by various categories of dealers; noting that the development of information of sales by discount stores presents problems; recognizing the need for a new, individual sales report as to this particular type dealer in comparison to all others; and containing a long and extended definition and description of discount stores and their history (noting that they emphasize "low prices"), and including an extensive listing of discount stores situated throughout the United States.

12. The Court excluded evidence that statistical information prepared by N.E.M.A. and A.H.L.M.A. was not made available to those not a member of this trade association, in excluding Pl. Ex. for Id. Nos. 2094 (A, C, N), 2097 (A, F, S) and 2098 (A, M). The Court's rulings on objections to this evidence are set out above; as well as a statement of the substance of such exhibits, except for Ex. Nos. 2097 and 2098.

a. Ex. No. 2098 are minutes of the Electric Dishwasher Section of N.E.M.A., of May, 1962, showing that it voted to permit only members of the section to have access to statistical sales information prepared by the Association.

b. Ex. No. 2097 are minutes of the N.E.M.A. Board of Directors, Consumer Products Division, of May, 1961, setting out the change in N.E.M.A. policy that each section may exclude non-members from having access to the statistical sales information; and noting that this information is the biggest advantage to N.E.M.A. membership.

13. The Court also excluded evidence that the members of N.E.M.A. and A.H.L.M.A. exchanged information as to sales by

price classification, in excluding Pl. Ex. for Id. Nos. 2099

(A, G, H, O), 3000 (A, M), 3004 (A, K), 3036 (AE-AF), and 3024.

Objections to such evidence as being hearsay and without foundation and relevancy (Tr. 6466) were sustained. (Tr. 6467-6470).

a. Ex. No. 2099 are minutes of the N.E.M.A. Market and Statistical Analysis Section, of February, 1961, noting that there was to be a quarterly report of dishwasher sales of all members, by factory price classification, and a report of manufacturers' total dollar amount of sales classified by factory selling price, (defined by excluding certain uniform, agreed-upon cost items).

b. Ex. Nos. 3000 and 3004 are N.E.M.A. statistical bulletins (1963, 1964) reporting domestic sales of various appliances classified by the manufacturers' factory prices and by industry-standardized capacity ratings, (including sales to distributors and "direct dealers") utilizing a uniform definition of manufacturers' "factory price".

c. Ex. No. 3024 is an A.H.L.M.A. statistical analysis of factory sales by the manufacturers' selling prices, for 1959.

d. Ex. No. 3036 is an A.H.L.M.A. study prepared for the Association's Board of Directors in 1963, showing factory sales classified by the manufacturers' selling prices, and the total amount and location of factory inventories.

14. The Court also excluded evidence that a representative of E.I.A. (Electrical Industry Association, of which appellee R.C.A. is a member) attended N.E.M.A. meetings, and

that there were joint meetings of N.E.M.A. and A.H.L.M.A., by excluding Pl. Ex. for Id. No. 3010.

15. The Court excluded evidence that appellee Borg-Warner, and other manufacturers of major appliances, determined not to approach the Federal Trade Commission concerning a proposed advertising code to be promulgated by A.H.L.M.A., in excluding Pl. Ex. for Id. No. 3026.

Objections to Ex. No. 3026 were made on the grounds that it was hearsay and irrelevant, which were sustained (Tr. 3508-3509, 6475-6477).

a. Ex. No. 3026 is an A.H.L.M.A. letter dated October, 1959, to Mr. Bull of Norge Sales, concerning the Association's proposed establishment of a voluntary code on advertising practices to be followed by the Home Laundry Industry which would be designed to control dealer advertising "where real problems exist", indicating a concern about "promotional price" violations of the Robinson-Patman Act, and contains a strong recommendation that the Association not approach the F.T.C. for review or approval of such a code.

16. The Court excluded appellants' studies showing that retailer co-conspirators had maintained the manufacturers' and distributors' list prices as their "tag" prices on the subject products.

These studies are Pl. Ex. for Id. Nos. 1561-1578 (Hale); 1579-1681 (Lachman Bros.), and 1560 (Redlick). Examination of appellants' expert witness who prepared such studies appears at Tr. 6365-6402. Objections on lack of foundation (Tr. 6382, 6385) and relevancy (Tr. 6382, 6395) were sustained

17. The Court excluded appellants' studies showing the dollar volume purchases by co-conspirator retailers of major appliances and television sets from the co-conspirator and appellee vendors, in excluding Pl. Ex. for Id. Nos. 4334, 4336 and 4340.

Examination of appellants' expert witness concerning the preparation of these studies appears at Tr. 6324-6335. Ex. No. 4334 was objected to as being self-serving, hearsay, and without foundation or relevancy (Tr. 6329); the Court initially reserved ruling (Tr. 6335-6336) and then upheld the objections. (Tr. 6358). Ex. Nos. 4336 and 4340 were subjected to the same objections (see Tr. 6360-6361), and the same ruling (Tr. 6361).

18. The Court excluded appellants' studies showing cooperative advertising credits allowed to Hale and other retail store co-conspirators, by the co-conspirator and appellee vendors

This evidence was contained in Pl. Ex. for Id. Nos. 4335, 4337, 4339, 1491 and 1492. Appellants' expert witness was examined at length concerning the preparation of Ex. No. 4335 (Tr. 6324-6335, 6336-6358). The grounds of objection and transcript references are:

<u>Exhibit</u>	<u>Objections</u>	<u>Ruling</u>
4335	irrelevant, prejudicial, argumentative (Tr. 6365-6368)	Tr. 6368
4337, 4339	same (Tr. 6329, 6358)	Tr. 6361
1491, 1492	hearsay, irrelevant, no foundation (Tr. 6363)	Tr. 6364

19. The Court excluded comparison evidence of the

with nationally advertised list prices of appellees R.C.A., and Whirlpool, in excluding Pl. Ex. for Id. Nos. 5064 and 5082.

Objections to these exhibits as being hearsay, without foundation, and cumulative (Tr. 6588-6589) were sustained (Tr. 6589).

a. Ex. Nos. 5064 and 5082 are reproductions of R.C.A., Whirlpool and Meyer price lists (comparative), showing in most cases complete similarity between the distributor's suggested retail price, and that of the appellee manufacturers.

20. The Court rejected Pl. Ex. for Id. Nos. 1500 and 1501 being a compilation of Manfree's sales and profits for the period 1957-1964. These exhibits were objected to as hearsay, lacking foundation, and without relevance, which were sustained. (Tr. 630-631)

21. The Court rejected appellants' offer of proof of the testimony of Mr. Sam Fractenberg, former officer of "Klor's, Inc." (a retail store in competition with Hale), showing that Hale asked distributor representatives to specify the names of retailers being sold products by such distributors in San Francisco; that his store was unable to obtain R.C.A. televisions, Philco appliances, and other major appliance and television lines because of orders from Hale to the vendors selling such items.

Upon appellants' offer of this testimony (Tr. 5665-5684), objections were made that it was hearsay, irrelevant and authority had not been established on the part of the witness to speak for his purported principal (Tr. 5674), and that Mr. Fractenberg had not been listed as a potential witness in appellants' pre-trial pleadings. (Tr. 5677-5680; 5682). The Court

been listed as a potential witness, pursuant to pre-trial order (Tr. 5682-5683). This testimony was also offered as impeachment of the testimony of Mr. Lau, a representative of G.E., but the Court denied that request (Tr. 5683-5684).

a. The offered testimony would show that Mr. Fractenberg had been a sales representative for Admiral appliances until June, 1955, when he joined Klor's. While with Admiral, and calling upon Hale, he was repeatedly asked by Mr. Hurd, a Vice-President, to name the other dealers selling Admiral products. While with Klor's, he asked Mr. Lau, a television salesman for G.E., why Klor's could not obtain G.E. televisions, and was informed by Lau that he had received notice that he was not to sell such products to Klor's any longer. In attempting to obtain R.C.A. televisions from Meyer, Mr. Fractenberg was told by Mr. Henry, a Vice-President, that Meyer could no longer sell such products to Klor's, but he refused to give a reason why. Mr. Fractenberg was told by Mr. Brolan, a Meyer television salesman, that his company did not want to sell to Klor's because Hale did not want it to have such products, and Meyer did not want to jeopardize their position with Hale. He would also testify as to a luncheon meeting with Mr. Shuster (at the time a Sales Manager for a San Francisco distributor of Philco products) where Shuster asked that Klor's give up the Philco line, because Hale had said that it would not do business with the distributor as long as Klor's was selling Philco. When Mr. Fractenberg said that his store would not give up the line, he was told that Klor's would no longer be able to obtain Philco products from



that company, which in fact occurred. Mr. Fractenberg would further testify that he was unable to obtain the Zenith, Emerson, Whirlpool, and other major lines of appliances, under similar circumstances, and that the Klor's store closed in January, 1957 because of its inability to obtain the leading brands of major appliances (Tr. 5666-5672).

22. The Court also excluded additional evidence concerning the inability of Klor's to obtain major appliances and television sets due to directions to vendors from co-conspirator Hale not to sell to that store.

Appellants offered the deposition testimony of Mr. George Klor, President of Klor's, Inc., from another lawsuit. (See Pl. Ex. for Id. No. 5025; Tr. 3973-3975). The Court rejected several offers of this testimony, apparently on the grounds that it was irrelevant. (See objection of appellee Borg Warner on such grounds, at Tr. 5312.) Appellants' offers and the Court's rulings appear at Tr. 3973-3975; 4343-4346; 4400-4401; and 5305-5313. See, also, Tr. 1537-1540.

a. The substance of the offered testimony to be given by Mr. George Klor was that his store, situated immediately adjacent to Hale's appliance store on Mission Street in San Francisco, was selling small G.E. appliances, but could not obtain major appliances; that he asked Mr. Lau, G.E. salesman (who testified in this case), if Klor's could obtain the full G.E. appliance line, upon which Mr. Lau replied that Klor's could not have such products because of Hale; and that his store was never able to obtain such products (Tr. 4343-4346).

THE TRIAL COURT ERRONEOUSLY REFUSED TO APPLY EVIDENCE OF STATEMENTS AND ACTS OF REPRESENTATIVES OF AN APPELLEE OR CO-CONSPIRATOR AGAINST IT, AND REFUSED TO GIVE SUCH EVIDENCE PROBATIVE VALUE

A. The Court Erroneously Ruled That Appellees Were Not Bound By The Adverse Testimony Of Their Employees:

1. The error set out in specification V(A)(1) hereinabove is incorporated. The other rulings, and witnesses concerned are as follows:

a. Mr. Gentile (Field Sales Representative of R.C.A. for the entire State of California). Tr. 4645-4648, 4748-4750, and 4753-4754.

b. Mr. Brightbill (Field Sales Representative of R.C.A.). Tr. 4754, 4760-4761, 4799-4802.

B. The Court Erroneously Ruled That Managing Agents Of Appellees, Who Were No Longer So Employed At The Time Of Trial, Were Not Representatives Of Adverse Parties Under Rule 43(b), And Prevented Impeachment Of Those Witnesses:

1. The witnesses involved, and the rulings thereon, are found as follows:

a. Mr. Sanford, former General Manager, Appliance Division, co-conspirator Hale (Tr. 504-507, 518-521); and former Vice-President, co-conspirator Meyer (Tr. 1191-1192).

b. Mr. Satterfield, former Regional Sales Manager, co-conspirator Philco (Tr. 3586-3587, 3548-3551).

c. Mr. Muntain, former salesman, appellee California Electric (Tr. 3932-3933, 3940-3941).

d. Mr. Lau, former sales counselor, appellee G.E.

C. The Court Erroneously Ruled That
Certain Witnesses Were Not Hostile
And Adverse To Appellants:

1. The witnesses concerned, and the rulings of the Court may be found, as follows:

- a. Mr. Schreck (Tr. 1651-1653, 1657-1659).
- b. Mr. Tobin (Tr. 2205-2208, 2224-2228).
- c. Mr. Erickson (Tr. 4846).
- d. Mr. Carlson (Tr. 4983-4984)

VII

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR IN DENYING APPELLANTS FULL SCOPE
OF CROSS-EXAMINATION, OR REHABILITA-
TION ON REBUTTAL, CONCERNING MATTERS
RAISED BY APPELLEES IN THEIR EXAMINA-
TION OF WITNESSES

The witnesses concerned and the rulings of the Court appear as follows:

- a. Mr. Sanford (Tr. 1037-1038)
- b. Mr. Thomas (Tr. 1537-1540).
- c. Mr. Tobin (Tr. 2227-2230).
- d. Mr. Schreck (Tr. 1657-1659, 1773-1774; and see 1769-1770).
- e. Mr. Fuller (Tr. 1852, 1873-1876; see 1866-1873).
- f. Mr. Laird (Tr. 1981-1983, 1995-1996, 2021-2029; see 1965-1978).
- g. Mr. Redlick (Tr. 2275-2279).
- h. Mr. Mayben (Tr. 3290-3293, 3297-3302; see 3264-3272, 3276-3285).
- i. Mr. Rising (Tr. 3865-3867).

j. Mr. Muntain (Tr. 3939-3941).

k. Mr. Mitchel (Tr. 3417-3419).

l. Mr. Shaw (Tr. 4309, 4313, 4324-4325; see 4322).

m. Mr. Bernard Freeman (Tr. 6055-6057; see G.E. Exhibit No. 8350, Tr. 6030-6036).

VIII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING APPELLANTS DISCOVERY OF DOCUMENTS RELEVANT AND MATERIAL TO THE ISSUES IN THIS CASE, OR LIKELY TO LEAD TO THE DISCOVERY OF SUCH EVIDENCE

- A. The Court Erroneously Denied Production Of Documents Described In Items 10 And 11 Of Plaintiffs' Motion For An Order To Show Cause Why Documents Should Not Be Produced By Defendant Frigidaire Sales Corporation.

1. Appellants' moving papers appear at R. 298, the Court's order at R. 419, 420; see Pre-Trial Hearing of April 17, 1964 (P. Tr. 2-7, 21-23).

- B. The Court Denied Plaintiffs' Motion For An Order To Show Cause Why Documents Should Not Be Produced By Defendant R.C.A.

1. Appellants' moving papers appear at R. 323, the Court's order at R. 413, 414; see Pre-Trial Hearing of April 17, 1964 (P. Tr. 25-84).

- C. The Court Denied Production of Documents Described In Item 15 Of Plaintiffs' Motion For The Production Of Documents Addressed To The Factory Defendants.

1. Appellants' motion, and the description of the items demanded, appear at R. 422, 425. See Pre-Trial Hearing of August 7, 1964 (P. Tr. 88-90).

Described In Item 13 Of Plaintiffs
Motion For The Production Of Documents
Addressed To The Distributor Defendants.

1. Appellants' moving papers, and the description of the documents concerned, appear at R. 434, 437. See Pre-Trial Hearing of August 7, 1964 (P. Tr. 88-90).

E. The Court Refused To Require Appellees
G.E., Whirlpool, R.C.A. And Co-Conspira-
tor Hale To Answer Questions Nos. 2, 3,
4, 5 and 6 of Plaintiffs' Interrogatories.

1. These interrogatories appear at R. 625, the Court's order at R. 671. See Pre-Trial Hearing of August 16, 1964 (P. Tr. 6-10).

F. The Court Denied Production Of Documents
Described Under Items 20, 22(c)-(e), And
27(f) Of Plaintiffs' Motion For The Pro-
duction Of Documents Addressed To Factory
Defendants.

1. The description of these items appears at R. 745, 750, 751-752. See, also, Pre-Trial Hearing of December 30, 1964 (P. Tr. 109-113, 115, 116-119, 124-127, 174-182, 188); and of December 31, 1964 (P. Tr. 234-237, 247-248, and 256).

G. The Court Refused To Require Appellees
G.E., Whirlpool, And R.C.A. To Answer
Questions Nos. 1, 2, 3 and 6 Of Plaintiffs'
Second Interrogatories Addressed To All
Defendants.

1. The interrogatories appear at R. 790, 791, 792, and 793. See Pre-Trial Hearing of December 30, 1964 (P. Tr. 197-200, 203-205).

IX

THE TRIAL COURT PERMITTED A PREJUDICIAL ERROR IN TAXING CERTAIN ITEMS AS COSTS AGAINST APPELLANTS

